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NO.

IN THE
Supreme Court of the United States
OCTOBER TERM 1985

FRED S. NOLAN, et al.,

Petitioners,

vs.

OTIS ELEVATOR COMPANY and the ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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JAMES F. SCHWERIN
On the Petition

EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Where there has been discrimination on the basis of age barred by both the Age Discrimination and Employment Act and the New Jersey law against discrimination is a state court action preempted by the Employees Retirement Income Security Act merely because it provides a longer statute of limitations?

2. Is the giving of additional benefits to older employees upon closing of a plant discriminatory when the employer did so only because, committed by virtue of an earlier attempt to open up more positions for younger employees?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the petitioners herein Fred S. Nolan, Ralph R. Battista, Charles W. Cleary, Joseph A. Davis, William J. Davitt, Jr., Anthony G. Gomes, James Halleck, Donald C. Halliwell, Phyllis J. Kerkawich, Joseph M. Karkosky, Jr., Charles Kerr, Mary Largey, Armand Machado, Edward M. McBride, Thomas P. Nugent, Peter J. Reilly, Herman J. Russomanno, Eugene A. Scannepico, Raymond J. Smith, John T. Starr, Harold C. Stoll, Louis C. Tremble, Walter Ward, Daniel M. Watson,James Van Bramer, and respondents Otis Elevator Company and the Attorney General of the State of New Jersey.

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Petititioners Fred S. Nolan, et al. respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered February 26, 1986.

OPINIONS BELOW

The opinion of the Sup Court of New Jersey is reported at 102 N.J. 30 (1986) and is reprinted in the appendix hereto at page 1a, et seq.

The decision of the Superior Court of New Jersey Appellate Division is reported at 197 N.J. Super. 468 and is reprinted in the appendix hereto at page a, et seq.

The decision of the Superior Court of New Jersey, Law Division, is reported at 197 N.J. Super. 70 and is reprinted in the appendix hereto at page a, et seq.

The decision of the United States District Court, District of New Jersey, is reported at 560 F. Supp. 119 and is reprinted in the appendix hereto at page a, et seq.

JURISDICTION

The opinion of the Supreme Court of New Jersey reinstating the judgment of the Superior Court, Law Division, was entered on February 26, 1986. There was no separate order or judgment issued by the Supreme Court of New Jersey. This petition for certiorari has been filed within ninety days of the New Jersey Supreme Court decision. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3) which states:

> Final judgments or decrees rendered by the highest court of the State in which a decision could be had, may be reviewed by the Supreme Court as follows: 3) By writ of certiorari, ... where validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, ...

STATUTES AND REGULATIONS INVOLVED

EMPLOYEES RETIREMENT INCOME SECURITY ACT, 29 U.S.C. §1144

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supercede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation

issued under any such law.

AGE DISCRIMINATION IN EMPLOYMENT ACT, 29 U.S.C. §623

(a) It shall be unlawful for an employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; ...

(f) It shall not be unlawful for an employer, employment agency, or labor organization -

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this

chapter...

AGE DISCRIMINATION IN EMPLOYMENT
ACT 29 U.S.C. §626

(d) No civil action may be commenced by an individual under this section until sixty days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed -

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under

State law, whichever is earlier.

(e)(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

PORTAL-TO-PORTAL ACT,
29 U.S.C. §255

Any action commenced on or after May 14, 1947 to enforce any cause of action ...

(a) if the cause of action accrues on or after May 14, 1947 - may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued; ...

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION INTERPRETATIONS, Age Discrimination in Employment Act, 29 CFR §1625.2

(b) The extension of additional benefits, such as increased severance pay, to older employees within the protected age bracket may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems relating to age discrimination. The extension of those additional benefits may not be used as a means to accomplish practices otherwise prohibited by the Act.

NEW JERSEY LAW AGAINST DISCRIMINATION, N.J.S.A. 10:5-2.1

Nothing contained in this Act or the Act to which this is a supplement shall be construed ... to interfere with the operation of the terms or conditions

and administration of any bona fide retirement, pension, employee benefit or insurance plan or program.

NEW JERSEY LAW AGAINST DISCRIMINATION, N.J.S.A. 10:5-12

It shall be unlawful employment practice or, as the case may be, an unlawful discrimination:

> a. For an employer, because of ... age ... to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment; ...

NEW JERSEY LAW AGAINST DISCRIMINATION, N.J.S.A. 10:5-13

Any complainant may initiate suit in Superior Court under this Act without

first filing a complaint with the division or any municipal office. Prosecution of such suit in Superior Court under this Act shall bar the filing of a complaint with the division or any municipal office during the pendency of any such suit.

At any time after 180 days from the filing of a complaint with the division, a complainant may file a request with the division to present the action by himself or through his own counsel to the Office of Administrative Law. Upon such request, the director of the division shall file the action with the Office of Administrative Law, provided that no action may be filed with the Office of Administrative Law where the director of the division has found that no probable cause exists to credit the

allegations of the complaint or has otherwise dismissed the complaint.

A party to an action based upon a violation of this Act shall mail a copy of the initial pleadings or claims, amended pleadings or claims, counterclaims, briefs, and legal memoranda to the division at the same time as filing such documents with the Office of Administrative Law or the court. Upon application of the Office of Administrative Law or to the court wherein the matter is pending, the division shall be permitted to intervene.

STATEMENT OF THE CASE

This is an action instituted in the New Jersey Superior Court alleging age discrimination against the petitioners' former employer, respondent Otis Elevator Company.

The basic facts are straightforward. All of the petitioners were management level employees of Otis at its Harrison New Jersey plant, and at the time of the termination of their employment in 1980, all had been with the company 25 years or more. Each petitioner received as a severance benefit one week's salary per year of service. All petitioners were at the time of termination of employment less than 55 years of age.

At the time of the closing, other Otis employees, who were in all

respects similarly situated to petitioners in terms of job titles and years of service, but who were all 55 years of age or older, received benefits in lieu of the severance pay given petitioners which were significantly more lucrative. Each of these other employees was offered the opportunity to enter into a "deferred compensation agreement" under which on the last day of each month commencing with a given starting date and lasting for a period of time stated in each individual agreement, benefits were provided as per a formula which resulted in these employees receiving far more than the severance pay given petitioners.

The giving of this deferred compensation agreement to the other employees was called by Otis the

"Harrison Special Supplemental Retirement Plan" (HSSRP). In its initial conception, it was intended to be utilized to lure older employees into utilizing the early retirement option available to employees aged 55 or older under the basic Otis retirement plan, the Otis Basic Retirement Plan for Salaried Employees (OBRPSE). The benefits offered under the HSSRP were calculated by tying into the benefits for early retirement under the OBRPSE. Under the HSSRP, all recipients must have had 25 years or more of service with Otis and be age 55 or older.

Sometime prior to putting the HSSRP into effect, the decision was made in the spring of 1980 to shut down the Harrison plant entirely. Therefore, all the employees as to whom the HSSRP was

being offered as well as the petitioners had no choice to make about retirement versus keeping their jobs at Harrison. Nevertheless, employees who fit the requirements created for HSSRP were still given that benefit, while petitioners were simply given the severance pay previously described.

No official notice of the existence of the HSSRP was ever given by Otis to the petitioners. Only those eligible to receive this plan were told by management, and petitioners learned of its existence only through informal means. None of the employees who participated in the HSSRP were actually retired until June 1, 1980 at the earliest, and the individual agreements effectuating participation in HSSRP were signed, at least in some instances,

subsequent to the actual retirement date.

The architect of the HSSRP was James Nelson of Otis' parent company, United Technologies. He stated that age 55 was selected as the cut off for the HSSRP solely because that was the age at which employees became eligible for early retirement in the OBRPSE and for no other reason. No consideration was given to whether or not providing these extra benefits would have any impact on combatting age discrimination as per the standards set forth in the Equal Employment Opportunity Commission (EEOC) interpretative regulation on that score.

The complaint in this case alleged a single cause of action on behalf of the 25 petitioners for violation of the New Jersey Law Against

Discrimination (LAD). Respondent Otis then removed the case to the United States District Court for the District of New Jersey. Its grounds for doing so were that the LAD was preempted by the Employees Retirement Income Security Act (ERISA). Furthermore, it sought to assert a counterclaim seeking declaratory judgment that ERISA preempted the LAD, and asserting that the complaint actually stated cause of action for benefits under ERISA, and asking the court declare its fiduciary duties. The District Court rejected the assertion that there were grounds establishing federal jurisdiction to support the removal, and remanded the case to the Superior Court of New Jersey.

In Superior Court, Otis

continued to press its claim that ERISA preempted the LAD, while abandoning the theory that a cause of action under ERISA was being advanced by petitioners. On motion for summary judgment by Otis, the Superior Court, Law Division dismissed the complaint finding that ERISA did preempt application of the LAD. The Superior Court, Appellate Division, reversed holding that preemption of LAD would impair the ADEA within the meaning of this Court's decision in Shaw vs. Delta Airlines, 463 U.S. 85, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983).

The New Jersey Supreme Court granted certification and reversed the Appellate Division, reinstating the judgment of dismissal entered by the Law Division. While the Supreme Court also

relied on preemption by ERISA, its reasoning was significantly different than that of the Law Division, and in fact was based on a theory not advanced by Otis and therefore not previously addressed by petitioners, to wit, a longer statute of limitations was provided. The decision of the New Jersey Supreme Court was issued on February 26, 1986 with no separate order or judgment accompanying it.

REASONS FOR GRANTING THE WRIT

1. PREEMPTION OF THE RIGHT TO BRING A SUPERIOR COURT ACTION UNDER NEW JERSEY LAW AGAINST DISCRIMINATION IMPAIRS THE JOINT FEDERAL/STATE SCHEME OF PREVENTING AGE DISCRIMINATION.

This Court has made it clear that prevention of invidious discrimination is, under federal law, a joint matter of federal and state cooperation. Allowing the states to have their citizens seek protection against discrimination through the mechanism of a direct lawsuit is in furtherance of that joint federal/state scheme, and should not be preempted by ERISA.

This Court laid down the ground rules for applying ERISA preemption to state antidiscrimination laws in its decision in Shaw. While Shaw was a Title VII case, there is no

question that the enforcement scheme under the ADEA is basically the same including the relationship between state and federal agencies. Oscar Mayer and Company vs. Evans, 441 U.S. 750, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (1979). This Court concluded in Shaw that preemption of the particular antidiscrimination law at issue would impair Title VII because it provided a means of enforcing Title VII's commands. 463 U.S. at 101, 103 S. Ct. at 2902. Allowing preemption to defeat the possibility of the state administrative agency granting relief was seen as contrary to the purpose of the statute:

> This would frustrate the goal of encouraging joint state/federal enforcement of Title VII; an employee's only remedies for discrimination prohibited by Title VII in ERISA plans would be federal ones. Such a disruption of the

> enforcement scheme contemplated by Title VII would, in the words of §514(d), "modify" and "impair" federal law. 463 U.S. at 103, 103 S. Ct. at 2903.

Beside eliminating an alternative forum, it was held that preemption of state remedies would increase the EEOC work load. Cclaims that might otherwise be resolved at the state level would have to go through EEOC thereby resulting in an added burden and the likelihood of less effective enforcement of the statute. 463 U.S. 103, n. 23, 103 S. Ct. at 2903.

The only limitation expressed by the Court was that there would be no impairment of Title VII to the extent that a state statute prohibited conduct lawful under Title VII. Concern was expressed that, consistent with the legislative intent behind ERISA,

employers not be faced with "conflicting or inconsistent state and local regulation of employee benefit plans." 463 U.S. at 105, 103 S. Ct. at 2904 quoting remarks of Senator Williams, 120 Cong. Rec. 29933 (1974). Therefore, to the extent that a state law made anything relating to an employee benefit plan illegal, when it would be lawful under Title VII, such provision would be deemed preempted by ERISA. Ibid.

This substantive consistency between federal and state law is the key to accomplishing the goals outlined in Shaw. It certainly would make things difficult for a company to create a plan if it could be lawful in one state and not in another. However, in this case, the decision of the New Jersey Supreme Court ignores that need for substantive

consistency in favor of relying only on the length of the statute of limitations as grounds for finding cause to preempt state law. It is submitted that the need to combat unlawful discrimination must take precedence over having a single time limit for challenging discrimination in a benefit plan.

In finding that the action commenced in Superior Court would not have been timely in pursuit of a federal remedy, the New Jersey Supreme Court adverted to the dual nature of the statute of limitations for a federal action. Thus, there must be a filing with EEOC within 300 days of the alleged unlawful practice, and an action must be instituted within two years of accrual under 29 U.S.C. §255, as adopted for the ADEA in 29 U.S.C. §626(e). 102 N.J. at

42, n.1. In holding that the federal remedy was no longer available, the Supreme Court of New Jersey did not make it clear on what basis it reached that conclusion. Petitioners concede that at the time the complaint in this action was filed, the 300 days for filing a complaint with EEOC had expired. However, the two year period for bringing an action in federal court had not. While Otis has asserted at times in the lower court proceedings that a two year statute of limitations should have been applied to the New Jersey Superior Court action, and that it had not been met by the May, 1982 filing, that has not been conceded by petitioners and has never been adjudicated in this case. It is petitioners' contention that the case

was filed within two years of the accrual of the cause of action. The plant was not actually closed until after May, 1980, none of the participants in the HSSRP actually were retired until at least June 1, 1980, and no notice of the HSSRP had been given to any of the nonparticipants as of May, 1980.

Therefore, the sole basis for saying that the federal remedy was no longer available was the failure to file with EEOC within 300 days. Nevertheless, there is nothing inconsistent about allowing a state court action to be filed within two years without recourse to administrative remedies when employers, even looking only at the ADEA, know that for two years after accrual they are subject to

a federal claim. This is especially true in light of the fact that the requirement of filing with EEOC is a prerequisite to bringing an action in federal court is not jurisdictional and may be waived. Kennedy vs. Whitehurst, 690 F. 2d 951, 961 (D.C.Cir. 1982), citing to Zipes vs. Trans World Airlines, 455 U.S. 385, 102 S. Ct. 1127, 71 L. Ed. 1127 (1982).

The clear concern of this Court in Shaw was the ability of employers to create plans. It is unrealistic to assume that the possibility that in certain instances the claimant may bring suit outside of a particular statute of limitations is going to be taken into consideration to any extent in deciding upon the terms of an ERISA benefit plan. Employers will

certainly look at federal law to see what subtantive provisions are lawful and should not have to review the laws of all 50 states to see if there will be an inconsistency. The holding in Shaw that preemption will follow where a state antidiscrimination law is broader than Title VII, or here the ADEA, as it relates to an employee benefit plan fully allays that concern. To extend it, as the New Jersey Supreme Court has done, to statute of limitations considerations goes far beyond the Shaw rationale, or that expressed in the legislative history of ERISA.

Certainly the element of limiting the work load of EEOC which was given recognition in Shaw is just as much served by having discrimination allegations resolved in the state courts

as it is by use of state administrative agencies. In fact, in New Jersey it is a reality that there is a greater likelihood that a matter brought in Superior Court will be removed from federal jurisdiction than if a complaint is filed with the New Jersey Division of Civil Rights. At the same time as the New Jersey legislature amended its statute to provide that an action may be brought in Superior Court, bypassing state administrative remedies, it also provided that if, after 180 days from the filing with the Division on Civil Rights, no resolution had been reached, a complainant could demand that the matter be immediately forwarded to the Office of Administrative Law for prosecution directly by the party alleging discrimination. The clear

import of such a provision is that matters filed with the Division on Civil Rights may well not be speedily resolved, necessitating that the claimant go forward himself in order to get resolution. The right to initiate a Superior Court action should be viewed together with the other provisions of N.J.S.A. 10:5-13 as a system designed to open as many avenues as possible for resolution within New Jersey of discrimination claims. It ill serves the purpose of joint federal/state administration of antidiscrimination remedies to place limits on which form of remedy may be utilized in a state such as New Jersey which has chosen to have additional ones available.

It has previously been held that the mere fact that a state provides

alternative antidiscrimination remedies in the form of administrative proceedings or a court action does not mean that the state is not a deferral state under the ADEA. Brownlow vs. Edgecomb Metals Co., 573 F. Supp. 679 (N.D.Oh. 1983). The court there noted that while it did not know why the Ohio legislature had established dual remedies, it was not the court's province to question state legislative motives, and recognition was given to the "varied and myriad approaches of the many states." Id. at 683.

This Court's attention is also directed to another ERISA preemption matter, Rebaldo vs. Cuomo, 749 F. 2d 133 (2d Cir. 1984), cert. den. __ U.S. ___, 105 S.Ct. 2702, 86 L. Ed.2d 718 (1985). The actual holding in that case was that

a state statute placing limits on hospital charges for self insured employee benefit plans precluding such plans from negotiating discount rates from hospitals was not preempted by ERISA. The rationale of this decision was that the regulation of the amount that hospitals could charge too remotely affected employee benefit plans to fall within the preemptive scheme of ERISA. Id. at 138. However, Judge VanGraafeiland went on to indicate his own belief that ERISA preemption should not be a means of stifling state experiments on means of effectuating matters which are the shared responsibility of the federal and state governments. His conclusion was:

> In sum, the writer does not believe that Congress intended that ERISA would preempt a project of co-

> operative federalism, such as we have here, a project that was authorized and ratified by federal statute and is intended in substantial part to conserve federal funds. Id. at 140.

Certainly, the Shaw decision makes it clear that combating discrimination is the shared responsibility of federal and state government. To that end, measures aimed at providing greater means of fighting such discrimination, such as the providing of a right to file a lawsuit in New Jersey, should not be hamstrung.

The actual argument put forward by Otis before the New Jersey Supreme Court was that the entire right to bring a direct action in Superior Court should be preempted by ERISA and only administrative proceedings allowed. Nothing in the New Jersey Court opinion

indicates acceptance of that argument. Rather, the New Jersey Court on its own carved out an even more limited area preemption based solely on statute of limitation concerns. By passage of statutes such as Title VII and the ADEA, Congress has shown a strong policy interest in limiting discrimination. To the extent that ERISA preempts state law, but not federal statutes, the policy would seem undoubtedly to be one of having only a single standard by which employers may judge whether the plans are proper. The best way of accomodating these interests is that which this Court utilized in Shaw, namely recognizing that substantitive provisions as to the content of plans going beyond what is prohibited by federal law will be preempted.

The New Jersey Supreme Court acknowledged that one of the purposes behind deferral was to avoid burdening the federal system. Yet it found that this would not be served by allowing recourse to a state lawsuit as was utilized here. 102 N.J. at 46. There is simply no justification for this conclusion. Use of a state remedy to conclusion, including a lawsuit, will certainly preclude the concurrent ability to prosecute a federal action. Thus, it clearly will serve the purpose of lessening the burden on the federal enforcement structure.

As to the other purpose served, use of an administrative remedy, that does no more than provide a limited time period for an attempt at reconciliation, and does not preclude

ultimate litigation in the federal courts. To the extent that opportunity for use of the administrative process may be lost, it should be deemed heavily outweighed by the goal of making available remedies for discriminatory actions by employers. If the Shaw test is satisfied, then the only truly relevant need for uniformity is protected and allowing preemption on any other basis aids only those who would discriminate in defiance of both federal and state law.

2. GRANTING ADDITIONAL SEVERANCE BENEFITS SOLELY ON THE BASIS OF AGE IS DISCRIMINATORY UNDER THE ADEA.

Under this Court's decision in Shaw, the sole ground for determining ERISA preemption is whether or not the conduct at issue violates the relevant federal discrimination statute. In this case, the granting of extra benefits to employees aged 55 and older who were in all other respects the same as petitioners was discriminatory under the ADEA.

The governing section of the ADEA is 29 U.S.C. §623(f)(2) which provides that it is not discriminatory to observe the terms of a bona fide employee benefit plan which is not a subterfuge to avoid the purposes of the ADEA. A bona fide plan simply needs to exist and actually pay benefits, United

Airlines vs. McMann, 434 U.S. 192, 98 S. Ct. 444, 54 L. Ed. 2d 402 (1977). There is no question that the HSSRP exists and benefits have been paid to some employees, so whether it is bona fide is not an issue in this case.

What petitioners do assert is that there is no plan within the meaning of §623, and even if there is, it is a subterfuge to avoid the purposes of the Act.

Existence of a plan in circumstances similar to those presented here has been addressed in EEOC vs. Westinghouse Electric, 725 F. 2d 211 (3rd Cir. 1983), cert. den. __ U.S. __, 105 S. Ct. 92, 83 L. Ed. 2d 38 (1984); EEOC vs. Borden's Inc., 724 F.2d 1490 (9th Cir. 1984); and EEOC vs. Great Atlantic and Pacific Tea Co., 618 F.

Supp. 115 (N.D. Oh. 1985). In all three instances, attempts to characterize severance benefits as a plan within the meaning of the ADEA were rejected. They are compelling support for petitioners' assertion here that there has been unlawful age discrimination.

In the Westinghouse case, it was held that layoff benefits did not constitute a plan within the meaning of the ADEA because they were analogous to a fringe benefit. Under the generally applicable Westinghouse pension plan, employees laid off without fault for lack of work were eligible for Layoff Income Benefits (LIB) if they had at least two years service and were not entitled to early retirement as specified in the Plan. The minimum age under which anyone could elect early

retirement was 55 for persons with more than 30 years service laid off as result of the plant closing, who could retire between their 55th and 60th birthday. When the plant was closed, a number of employees aged 55 and older were informed by Westinghouse that they were ineligible for LIB because they were entitled to early retirement.

Although the District Court found that denial of the LIB to older workers was based upon reasonable factors other than age and that Westinghouse had operated under the terms of a bona fide benefit plan, the Third Circuit reversed. It was held that the relationship between eligibility for early retirement and age served to deny LIB to older workers who had accumulated more years of service,

and therefore was a distinction based on age. 725 F. 2d at 222, and n. 7

Furthermore, there was no bona fide employee benefit plan because LIB was not a plan within the meaning of §623(f)(2).

In the Borden's case, the company closed a dairy operation and terminated all but a few management personnel. By addenda to a Collective Negotiations Agreement executed about a month prior to the closing of the plant, severance pay was created as a benefit in the event of closure. Employees eligible for normal or early retirement were excluded from severance pay; for retirement eligibility an employee had to have at least two years of continuous service and be at least 55 years of age. Employees excluded by these criteria

from receiving severance pay filed a claim under the ADEA.

The Ninth Circuit held that where eligibility for benefit is conditioned upon eligibility for retirement which in turn is limited to employees 55 or older, age was the "but for" cause of denial of severance pay. 724 F. 2d at 1393. Severance pay was not a plan within the meaning of §623(f)(2) as it had only a loose connection to existing pension plans. Even if severance pay policy had been part of an overall benefit scheme, denial of severance pay to retirement eligible employees was still found open to question. Id. at 1396-97.

Most recently in the A & P case, the employer once again tried to claim existence of a plan falling within

the statutory exception by virtue of the fact that severance pay was tied to the regular pension plan. Severance pay was denied to all those employees eligible for early retirement, for which one had to be at least 55 years old. The court found that A & P had simply dragged in its pension plan "to clothe its severance pay plan with legitimacy and to achieve results which it was not designed to achieve." 618 F. Supp. at 121. The severance pay and the underlying pension plan were found not to be "part and parcel of a total, integrated benefit package." Id. at 122. They were adopted at different times and documented separately. Ibid. Therefore, the result was the same as in Westinghouse and Borden upon which the court in A & P relied.

Nothing really differentiates the HSSRP from what went on in Westinghouse, Borden's and A& P. Simply because the word "plan" was used in creating a name, does not make it a plan within the meaning of the ADEA. The plant was closed and the benefit given to the participants in the HSSRP was in lieu of the severance pay received by petititoners. The only difference between petitioners and those in the HSSRP was age.

Otis has claimed in this case that its actions were shielded by the fact that the ADEA, at 29 U.S.C. §626(e) adopts §10 of the Portal-To-Portal Act of 1947, 29 U.S.C. §259. §10(a) of that statute provides that an employer may rely on "any written administrative regulation, order, ruling, approval or

interpretation, of the government agency responsible for enforcement of the statute.

An employer seeking to rely on this defense "must prove a good faith reliance by objective evidence." EEOC vs. Baltimore and Ohio Railroad Company, 632 F.2d 1107, 1112 (4th Cir. 1980). The administrative bulletin or other document must be specific enough to cover the particular employment situation. Ibid. As stated in EEOC vs. Home Insurance Co., 672 F.2d 252 (2d Cir. 1982):

> Thus, the Portal Act defense requires the employer to establish three interrelated elements:
>
> (1) that its action was taken in reliance on the ruling of the administrator,
>
> (2) that it was in conformity with that ruling,

(3) that it was in good faith. 672 F. 2d 263.

The Second Circuit in the Home Insurance case rejected the notion that general good faith is enough. The employer must have more than an honest intention to ascertain what the Act requires. If there is not conformity with the requirements there cannot be good faith sufficient to "save the day." Id. at 265.

In this case, the testimony of the architect of the HSSRP, James Nelson of United Technologies, does not establish any entitlement to the Portal-To-Portal defense. Opinion letter WH-451 of the Wage-Hour Administrator (January 31, 1978) expressed an opinion that giving greater severance pay to older employees would not violate the ADEA because it would

grant additional financial security to those who might have more relocation problems. In 1979 however, authority to implement the ADEA was transferred to EEOC. In November, 1979, it issued proposed regulations including §1625.2(b) which as proposed read:

> The extension of additional benefits such as longer vacations, increased severance pay or more favorable shift preferentials may be lawful in certain circumstances when made to older employees within the protected age to promote or encourage opportunities for such individuals who might otherwise experience disproportionate hardship, so long as the extension of such benefits does not create an unreasonable hardship for the younger employees within the protected age bracket.

The regulations even as proposed certainly had to put Otis on notice that additional benefits to older employees including increased severance

pay would only be lawful "in certain circumstances" and had to be premised on encouragement of opportunity for older employees. Mr. Nelson testified that in constructing the HSSRP no consideration was given to promoting opportunities for older persons. No studies were done as to possible job opportunities elsewhere for older vs. younger employees. While Mr. Nelson indicated that he had referred to §1625.2(b), he stated that was done only to the extent that in his mind it was consistent with the existing early retirement policy allowing retirement at age 55.

Subsequently, after receiving comments on the proposed §1625.2(b), EEOC amended that section. The actual section as adopted states that additional benefits to older employees

"may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination." The original language regarding hardship to younger employees was deleted by EEOC, because, as stated at 46 Fed. Reg. 47724, that language had been deemed ambiguous and raised questions regarding the legal basis for discrimination between members of the class protected by ADEA. As further stated, the section was never intended to sanction discrimination between individuals protected by the statute.

In addition to there being no plan qualifying for the ADEA exception, petitioners also assert that the HSSRP was a subterfuge. There is no dispute that it was initially to be used to

entice older employees to retire and open opportunities for younger persons. If that had stayed the situation, it might well be that Otis could say that it was simply offering an opportunity for voluntary retirement and therefore was not violating any law. However, once the decision to close the plant was made, that element disappeared. Everybody was going to lose their jobs. Naturally, anyone accorded the choice between the severance pay given petitioners and the early retirement plan providing a lot more money would choose the latter. There was nothing voluntary about the HSSRP by the time it was actually given to those who participated, by which time the plant closing decision was a reality known to all. In that situation, giving

additional benefits to the older employees as severance from their employment at least had to fit within the limitations expressed in the EEOC regulation. Because the whole plan was dreamed up in the first place to get older employees out of the way, it was clearly not aimed at combating problems of age discrimination. Where everyone is being terminated because the plant is closing, everyone similarly situated in terms of level of employment and years on the job should be treated equally.

CONCLUSION

For the aforestated reasons, the petition for a writ of certiorari to the Supreme Court of New Jersey should be granted.

Respectfully submitted,
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Dated: May 21, 1986

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-51 September Term 1985

FRED S. NOLAN, RALPH R. BATTISTA, CHARLES W. CLEARY, JOSEPH A. DAVIS, WILLIAM J. DAVITT, Jr., ANTHONY G. GOMES, JAMES HALLECK, DONALD C. HALLIWELL, PHYLLIS J. GORLEY KERKAWICH, JOSEPH M. KARKOSKY, JR., ARMAND MACHADO, EDWARD M. McBRIDE, THOMAS P. NUGENT, PETER J. REILLY, HERMAN J. RUSSOMANNO, EUGENE A. SCANNEPICO, RAYMOND J. SMITH, JOHN T. STARR, HAROLD C. STOLL, LOUIS C. TREMBLE, JAMES VAN BRAMER, WALTER WARD and DANIEL M. WATSON,

Plaintiffs-Respondents,

v.

OTIS ELEVATOR COMPANY, a corporation organized and existing under the laws of the State of New Jersey,

Defendant-Appellant.

Argued November 19, 1985 - Decided February 26, 1985

On certification to the Superior Court, Appellate Division, whose opinion is reported at 197 N.J. Super 468 (1984).

Peter F. Healey, a member of the District of Columbia bar, argued the cause for appellant (Stoldt, Horan & Cino, attorneys; John D.

Horan of counsel and on the briefs).

William S. Greenberg argued the cause for respondent (Greenberg, Kelley & Prior, attorneys; James F. Schwerin on the briefs).

Susan L. Reisner, Deputy Attorney General, argued the cause for intervenor New Jersey Division on Civil Rights (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; Andrea M. Silkowitz, Deputy Attorney General, of counsel; Ms. Reisner and Nancy Kaplen Miller, Deputy Attorney General, on the brief).

Rosemary Alito submitted a brief on behalf of amicus curiae Equal Employment Advisory Council (Carpenter, Bennett & Morrissey, attorneys).

The opinion of the Court was delivered by O'HERN, J.

The threshold question in this appeal is whether the federal Employee Retirement Income Security Act of 1974 (ERISA) preempts the application of New Jersey's Law Against Discrimination (NJLAD) to a claim of age discrimination in an

employee pension plan when the action is brought after the comparable federal time requirement for such an action has not been met. The underlying substantive issue is whether a supplementary plan of voluntary early retirement benefits offered to supervisory employees who have attained age 55 with 25 years of eligible service discriminated against younger workers who may have the same number of years in service.

We hold that ERISA preempts the untimely claim under state law and therefore do not resolve the substantive issues, although we note the apparent impediments to such a claim posed by saving provisions of the federal Age Discrimination in Employment Act (ADEA).

I

The plaintiffs in this case

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were all employees of defendant, Otis Elevator Company, at its Harrison, New Jersey plant. They were management-level employees who were not represented by a labor union. The Harrison plant was closed on December 31, 1980. Plaintiffs were laid off from work at various times; some of the plaintiffs stayed on until the final closing-down of the plant even though their employment had previously been formally terminated.

Each plaintiff received as a severance benefit one week's salary for each year of service. All of the plaintiffs had at least 25 years or more of service and were under the age of 55. Other Otis employees who were over 55 years of age but otherwise similarly situated with the plaintiffs did not receive severance pay but instead became eligible immediately

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for benefits under a special supplemental retirement plant. Under this special plan, those over-55 employees receive 90 percent of their final average annual earnings for a four-year period or until they reach the age of 62, whichever is longer. The 90 percent benefit is calculated on the basis of the income from all sources, including income derived from social security as well as benefits payable under Otis' basic retirement plan. The basic plan remains in effect for all of the employees whether over or under 55, pursuant to vested rights they have in it. Plaintiffs instituted this action under the NJLAD for relief in the form of benefits equal to those received by employees who qualified for the supplemental plan.

Because the case arises on

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motion for summary judgment, we accept as true the plaintiffs' version of the facts. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). The background relevant to the creation of the so-called "Harrison Special Supplemental Retirement Plan" (HSSRP) is drawn from the deposition testimony of James Nelson, Manager of Employee Benefits for United Technologies Corporation, the parent corporation of Otis.

Mr. Nelson was responsible for the design and costing of the HSSRP. The plan was developed after Otis made a special request to United Technologies regarding use of a deferred-compensation program. The requirements written into the plan were that any recipient: (1) must have had 25 years or more of service with Otis because this was deemed a

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significant period of service, and (2) must have attained the age of 55 because that was the standard early retirement age used in existing Otis benefit plans. The Harrison plan was based in structure on one used previously in conjunction with a reduction in force at Pratt and Whitney, an aerospace division of United Technologies. No policy exists within United Technologies regarding the offering of such a plan in any given situation. Apparently the HSSRP was offered to eligible employees of Otis in January or February 1980.

As initially contemplated, the HSSRP was to be utilized as part of a scaling-down of the Harrison operation before any decision was made to close it down completely. It was said to be designed to encourage employees who were eligible for early

retirement to retire voluntarily sooner rather than later and to make remaining opportunities available to more people. The deferred-compensation program was established specificaly for the two occasions on which it was used: the 1976 reduction-in-force at Pratt and Whitney, and the situation regarding the Otis facility in Harrison. Unlike longstanding benefit plans, such as the Otis Basic Retirement Plan for Salaried Employees (OBRPSE), which have printed booklets describing the plans and their benefits that are routinely made available to all employees, no booklet was ever printed for the HSSRP. In fact, the plan was not made known by Otis to any employees other than the ones who met the criteria for inclusion; salaried management employees with 25 years or

more of service who were age 55 or older. Similarly, the 1976 Pratt and Whitney plan was never publicized in booklet form either.

Nelson testified that in creating the HSSRP, he did check all ERISA regulations and various other regulations of the United States Department of Labor, and consulted with the legal staff at Otis Elevator Company. The individual agreement form for those participating in the HSSRP stated that it was to be interpreted under the laws of New York, the state where Otis Elevator Company's headquarters were located. Nelson himself never saw any opinion letters from the wage-hour administrator regarding age discrimination in severance benefits although he did state that he consulted published information. With

regard to proposed Equal Employment Opportunity Commission (EEOC) regulations appearing in the Federal Register of November 30, 1979, regarding extension of additional benefits to older employees to encourage opportunities for such individuals, Nelson testified that he considered only the fact that age 55 was consistent with existing retirement policies and that because originally the plan was to be utilized together with a phase-out rather than a closing, it would make more opportunities available to remaining people. No study was ever undertaken on behalf of Otis or United regarding the differences in severance benefits or compensation to be paid to any Harrison employees on the basis of age, nor was any report ever prepared as to reasons for paying more to

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employees age 55 with 25 years or more of servive thant to those who also had 25 years or more of service but were not age 55. There were no studies or even discussions of the problem of getting new or other employment for older employees who would no longer be working at Otis' Harrison facility. On the question of promoting opportunities for individuals who might experience disproportionate hardship due to their age, Nelson testifed that the only factor considered was that age 55 was consistent with existing retirement policies.

Otis apparently began to offer the HSSRP to eligible employees in January or February of 1980. Eligibility to participate in the HSSRP was limited to managerial employees who, by virtue of their service, already qualified for early retirement under Otis' basic pension

plan. Defendants assert that by March or April of 1980 a number of plaintiffs herein had learned from eligible employees that the HSSRP had been offered to eligible employees. Defendant asserts that it was not until May 1980 that the decision was made to close the Harrison plant due to its continuing losses and that the closing was not completed until December 1980. Plaintiffs contest this point most vigorously. They assert that since Otis planned to shut down the plant long before May, the HSSRP plan was not bona fide, but was a scheme to evade the strictures against discrimination on account of age and a subterfuge to avoid the economic warfare that attends the closing of a plant. Plaintiffs argue that they should be treated equally with other members of the work force.

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No action was brought in state or federal forums, however, until May 12, 1982, when the 25 individual plaintiffs filed a Superior Court complaint against defendant, alleging a cause of action arising under the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -42, for discrimination on the basis of age.

After removal to and remand from the United States District Court for New Jersey, the case came on for summary judgment in the Superior Court, Law Division. The Law Division granted Otis' motion for summary judgment on the ground that federal regulation of employee benefit plans, through ERISA, preempts the NJLAD when the NJLAD is used to challenge an employee benefit plan. Under applicable federal law, inconsistent

provisions of state law relating to employee benefit plans are preempted unless their preemption would impair federal law. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 102-03, 77 L.Ed..2d 490, 504-05 (1983). The trial court found that the NJLAD, under which plaintiffs' claim was brought, related to an ERISA-regulated employee benefit plan and that its preemption would not impair the federal age discrimination law. 197 N.J. Super. 70, 75-77 (1983).

On appeal, the Appellate Division reversed, finding that a sufficient interrelationship exists between the NJLAD and the ADEA so that enforcement of the federal law would be hampered if the state law were preempted. The court therefore concluded that even a limited preemption of a right of direct suit

under the NJLAD would impair the ADEA. 197 N.J. Super, 468, 472-73.

We granted the defendant's petition for certification. 101 N.J. 272 (1985).

II

The history and background of the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §§1001 to 1461, have been set forth in a series of United States Supreme Court decisions. A brief description of the act will suffice.

Congress enacted ERISA in 1974 "to protect participants of employee benefit plans and their beneficiaries from the abuses which previously existed in many retirement plans." See Note, ERISA: Preemption of State Health Care Laws and Worker Well-Being, 4 U. Ill. L.R. 825 (1981) (footnotes omitted). Both lower

courts found -- and plaintiffs do not argue otherwise -- that the HSSRP is an "employee benefit plan." See 29 U.S.C.A. §1002(3) ("employee benefit plan" includes both pension plans and health and welfare plans). The statute imposes participation, funding, and vesting requirements on pension plans. It also sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility for both pension and welfare plans. It is a "comprehensive and reticulated statute," which Congress adopted after careful study of private retirement pension plans. Nachman Corp. v. Pension Benefit Guar. Corp., 446 U.S. 359, 361, 64 L.Ed.2d 354, 358 (1980). Congress, through ERISA, wanted to insure that "if a worker has been promised a defined pension benefit

upon retirement--and if he has fulfilled whatever conditions are required to obtain a vested benefit--that he actually receive it." Id. at 375, 64 L. Ed.2d at 367. Congress has provided for civil and criminal enforcement of the act, and an insurance program was created to protect employees against the loss of benefits upon termination of pension plans that lack sufficient funds to pay such benefits in full. Id. at 361 n.1, 64 L.Ed.2d at 358 n.1.

"Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" Fidelity Federal Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 152-53, 73 L.Ed.2d 664, 675 (1982) (citation

omitted) (quoted in Shaw v. Delta Air Lines, Inc. supra, 463 U.S.at 95, 75 L.Ed.2d at 500). In enacting ERISA, Congress took nothing for granted. To guarantee federal uniformity in the supervision and administration of pension plans, Congress displaced entirely all prior state regulation of such employee benefit programs. The act includes one of the most sweeping preemption provisions ever contained in any federal program. Section 514(a) of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA]." 29 U.S.C.A. §1144(a). In Alessi v. Raybestos-Manhattan,Inc., 451 U.S. 504, 68 L.Ed.2d 402 (1981), the United States Supreme Court held that ERISA preempted a New Jersey statute that did not allow employers to reduce a

retiree's pension benefit by an amount equal to the retiree's workers' compensation award. The Court stated: "It is of no moment that New Jersey law intrudes indirectly, through a workers' compensation law rather than directly, through a statute called 'pension regulation.' ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern." Id. at 525, 68 L.Ed.2d at 418. Saved only are state laws regulating insurance, banking and securities, and generally-applicable state criminal laws. 29 U.S.C.A. §1144(b)(2)(A) and (b)(4).

The parties agree, as the lower courts found, that the NJLAD "relates to" ERISA benefit plans and comes within §514 of ERISA. The only hope for survival of New Jersey's law

against discrimination stems from its symbiotic relationship with federal laws against discrimination. Section 514(d)of ERISA provides that: "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States *** or any rule or regulation issued under any such law." 29 U.S.C.A §1144(d). Quite simply, the question is whether preemption of the NJLAD will impair a law of the United States.

The key case is, of course, Shaw v. Delta Airlines, supra, 463 U.S. 85, 77 L.Ed.2d 490. At issue in Shaw was a provision of the New York Human Rights Law, N.Y.Exec. Law §§290 to 301 (McKinney 1982 and Supp. 1982-83), that required employee health-benefit plans to pay sick-leave benefits to employees unable to work

because of pregnancy or other nonoccupational disabilities. N.Y. Exec. Law §204. Noting that ERISA originally contained a limited preemption clause that encompassed only state laws applicable to the specific subjects covered by ERISA and that Congress rejected this provision in favor of the present language, the Court found that "the section's pre-emptive scope was as broad as its language." Shaw, supra, 463 U.S. at 98, 77 L.Ed.2d at 502. In the preemptive section of 514(a) Congress used the phrase "relate to" in its broad sense; hence the pregnancy-benefit provisions clearly related to the administration of an ERISA plan. Id. at 100, 77 L.Ed.2d at 502-03.

Turning then to the only available savings provision, that of

section 514(d) that ERISA should not be construed to impair or supersede any law of the United States, the Court noted that Title VII of the Federal Civil Rights Act required recourse to available state administrative remedies whenever an employment practice prohibited by Title VII occurs in a state that prohibits the practice and has established an agency to enforce the prohibition. Id. at 101-02, 77 L.Ed.2d at 504 (citing 42 U.S.C. § 2000e-5(b)). Hence, the Court concluded that a full preemption of New York's Human Rights Law would impair Title VII to the extent that the state law against discrimination provides a means of enforcing Title VII's command. Insofar as the state law outlaws employment practices that are lawful under Title VII, however,

preemption would not impair the federal program within the meaning of §514(d). Shaw, supra, 463 U.S. at 102-03, 77 L.Ed.2d at 504-05. Therefore, the court invalidated that provision of the New York law that would have mandated pregnancy benefits, a substantive requirement not contained in the federal plan. Id. at 109, 77 L.Ed.2d at 508. (Congress has since amended Title VII with the Pregnancy Discriminatin Act of 1978, 42 U.S.C.A. §2000(e)(II).)

Although phrased in terms of preempting state benefits plans only insofar as the plan prohibits practices that are lawful under federal law, we perceive in Shaw an underlying principle in favor of uniformity of administration of benefit plans. That Court emphasized an ERISA sponsor's statement:

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> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.
>
> [Shaw, supra, 463 U.S. at 99, 77 L.Ed. at 502 (quoting 120 Cong. Rec. 29197 (1974) (Statement of Rep. Dent)).]

Thus, "[w]hile §5214(d) many operate to exempt provisions of state laws upon which federal laws depend for their enforcement, the combination of Congress' enactment of an all-inclusive pre-emption provision and its enumeration of narrow, specific exceptions to that provision makes us reluctant to expand §514(d) into a more general saving clause." Id. at 104, 77 L.Ed.2d at 505

(emphasis supplied). The Court concluded: "Congress applied the principle of pre-emption 'in its broadest sense to foreclose any non-Federal regulation of employee benefit plans,' creating only very limited exceptions to preemption." Id. (qouting 120 Cong. Rec. 29197 (1974) (remarks of Rep. Dent)). Thus, the question of the availability of the state remedy sought turns on whether it is necessary to the continued life of the federal program.

III

The federal Age Discrimination in Employment Act (ADEA) has an exhaustion-of-state-remedies requirement similar to that of Title VII. The scheme was discussed in Oscar Mayer & Co. v. Evans, 441 U.S.

750, 65 L.Ed.2d 609, (1979), as being substantially patterned upon the Title VII deferral provisions that were reviewed in Shaw v. Delta Airlines, supra. Section 14(b) of the ADEA provides that:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title [establishing right to bring civil action for age discrimination] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated * * * .
>
> [29 U.S.C.A. §633(b).]

Noting that Congress intended under Title VII to screen from the federal courts those problems of civil rights that could be settled to the satisfaction of the grievant in

a voluntary and localized matter, the Court concluded that the construction of section 14(b) in ADEA should follow that of Title VII in that it is intended that resort to administrative remedies in states with agencies empowered to remedy age discrimination is mandatory and not optional. Oscar Mayer, supra, 441 U.S. at 753, 60 L.Ed.2d at 624. The Court therefore concluded that prior resort to appropriate state proceedings is required under section 14(b) just as under Title VII. Id. at 756, 60 L.Ed.2d at 616.

Since state age-discrimination proceedings therefore form a part of the federal enforcement program, under the principles of Shaw v. United Airlines, supra, the state law is not entirely preempted. The preemption would be

partial; the state program could survive to the extent that it is not inconsistent with the federal program. Shaw, supra, 463 U.S. at 103-04, 77 L.Ed.2d at 504-05. Plaintiffs argue that since the substantive commands of both the NJLAD and the ADEA are essentially the same, there is no inconsistency.

We are left, however, with this inconsistency. No civil action at all may be commenced by an individual under the ADEA "until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission," 29 U.S.C.A. §626(d), and, in the case of a deferral state, must be commenced "within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of

termination of proceedings under State law, whichever is earlier." 29 U.S.C.A. §626(d)(2) (emphasis supplied). How then can it be said that the federal right "depends on" the state program, Shaw, supra, 463 U.S. at 103, 77 L.Ed.2d at 504-05, when in a given case the federal right has expired? 1/

1/ Strictly speaking, there are two relevant federal time periods under the ADEA. In a deferral state, such as New Jersey, the plaintiff must (1) comply with 29 U.S.C.A. §626(d)(2), which requires that a charge alleging discrimination be filed with the EEOC within 300 days of the alleged unlawful practice, and (2) comply with 29 U.S.C.A. §626(e), which incorporates the statute of limitations from the Portal-to-Portal Act under 29 U.S.C.A. §255. See Hay v. Wells Cargo, Inc., 596 F.Supp. 635, 638 (D. Nev. 1984).

> The limitations period under §255 is three years in the case of a willful violation; otherwise it is two years. * * * Therefore, even though plaintiff may have filed his claim in federal court within the three year limitations

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It is the familiar question of substance and procedure. See Guaranty Trust Co. v. York, 326 U.S. 99, 89 L.Ed.2d 2079 (1945). Generally speaking, the time within which a federal right is to be enjoyed is measured by the federal period of limitations. Where a federal statue established a limitation period for the enforcement of federal rights, and

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(Footnote continued)
period of §§626(e) and 255 the claim is still subject to dismissal if the time requirements for filing a charge under §626(d) are not met.

[Id. (citation omitted).]

Since the plaintiffs have "failed to file" a charge with the EEOC within 300 days of [their] termination, as required by §626(d)(2)***," their claim is "barred unless a reason for equitable modification of the limitations period appears." Id.; see also Heiar v. Crawford County, 746 F.2d 1190, 1194-1196 (7th Cir. 1984), cert. denied, __ U.S. __, 87 L.Ed.2d 631 (1985).

that period is an integral part of the right created, that limitation must be applied in actions brought in state courts, whether the state statute be longer or shorter. Engel v. Davenport, 271 U.S. 33, 70 L.Ed. 813 (1926); Atlantic Coast Line R. Co. v. Burnette, 239 U.S. 199, 60 L.Ed. 226 (1915); see also McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 228-30, 2 L.Ed.2d 1272, 1278-79 (1958) (Brennan, J., concurring) (seaman's cause of action for unseaworthiness could be measured by analogous action and applicable three-year statute of limitations for negligence under Jones Act). And even where there is no federal period of limitations, federal policy is the dominant consideration in determing what is the appropriate period of limitations. Del Costello

v. Teamsters, 462 U.S. 151, 170-71, 76 L.Ed.2d 476, 492-93 (1983) (claim of breach of duty of fair representation so closely related to labor law that the six-month period for making charges of unfair labor practices to the NLRB should be applicable). Only when there is no period of limitations in the federal program do the federal courts borrow state statutes of limitations, and even in those circumstances a broad characterization of federal claims is necessary to achieve national uniformity. Wilson v. Garcia, 471 U.S. __, __, 85 L.Ed.2d 254, 262-63 (1985).

So dominant is the relationship of federal right over state remedy under ADEA that an inconsistent and shorter state period of limitations is to be disregarded if it interferes with the federal policy.

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In Oscar Mayer, supra, the plaintiff's employer moved to dismiss the complaint of age discrimination on the grounds that a state agency was empowered to remedy the discrimination and that section 14(b) of the ADEA required resort to the state remedy prior to commencement of a federal suit. The District Court denied the motion. The Court of Appeals affirmed, holding that the employee was not required to file a complaint with the state agency before coming into federal court. 580 F.2d 198, 300 (8th Cir. 1978). The Supreme Court reversed but gave the claimant the opportunity to make a state claim. The Court held that even though the time within which plaintiff could have brought his action under Iowa law had expired, plaintiffs could satisfy the deferral provisions of federal law by

simply filing a claim with the state agency and leaving it to the state agency to determine whether it would enforce its limitations period. Oscar Mayer, supra, 441 U.S. at 764-65, 60 L.Ed.2d at 621. The requirement of deferral to the state was not to be confused with giving the state an opportunity to deny the right. Id.

To the same effect is Kuntz v. Reese, 760 F.2d 926 (9th Cir. 1985). In light of Congress' intent "'to provide the full range of legal and equitable remedies available in both state and federal courts * * *,'" that court concluded that application of the shorter California limitations period to the plaintiffs' claim of fund mismanagement was the kind of "jurisdictional or procedural obstacle to enforcement that Congress intended to eliminate when it enacted ERISA."

Id. at 937 (quoting S.Rep. No. 127, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad News 4838, 4871). Here we have the converse situation. The state period of limitations is longer. Still, deferral should not be confused with enlargement of the federal right. Otherwise, plan administrators and fiduciaries would be subject to varying and inconsistent state regulation in the several jurisdictions in which a plan operates. Plan administrators would not know when repose was granted against claims of discrimination under the ADEA.

Moreover, there are other underlying considerations that support the view. In the words of Senator Dirksen, deferral to state agencies is designed to promote speed, not delay:

> [A]t the local level*** many

> cases are disposed of in a matter of days, and certainly not more than a few weeks. In the case of California, FEPC cases are disposed of in an average of about 5 days. In my own State it is approximately 14 days.
>
> [Oscar Mayer, supra, 441 U.S. at 757-58, 60 L.Ed.2d at 617 (quoting 110 Cong. Rec. 13087 (1964)]

A well-established body of federal precedent holds that the ADEA's administrative prerequisites are waivable only for good cause and serve the important ADEA statutory goals of prompt notice, opportunity for voluntary resolution, and avoidance of litigation. See, e.g., McClinton v. Alabama By-Products Corp., 743 F.2d 1483, 1485 (11th Cir. 1984); Edwards v. Kaiser Aluminum & Chemical Sales, Inc., 515 F.2d 1195, 1197-99 (5th Cir. 1975). ADEA administrative prerequisites may be equated with Title VII's that are "not

*** legal hypertechnicalities [but] basic elements[s] of the administrative remedy". Martin v. Easton Pub. Co., 478 F. Supp. 796, 797 (E.D. Pa. 1979).

This is so because "[s]ection 633(b) envisions a state authority equipped *** to mediate genuine disputes [and] to attempt to resolve disputes through voluntary compliance***." Eklund v. Lubrizol Corp., 529 F.2d 247, 249 (6th Cir. 1976) overruled on waiver issue, Wright v. Tennessee, 628 F.2d 949, 953 (6th Cir. 1980). Similarly, in the Title VII context, policy considerations "contemplate the possibility of resolving disputes without the antipathies spawned by litigation and of affording the prospective defendant an opportunity to comply with the law voluntarily or

to explain and justify his conduct prior to the expense and publicity of litigation." Martin v. Easton Pub. Co., supra, 478 F.Supp. at 797.

We recongize that a state's age discrimination program need not mirror the federal program in order for the state to qualify as a deferral state under the ADEA. See, e.g., Brownlow v. Edgcomb Metals Co., 573 F.Supp. 679, 683 (N.D. Ohio 1983) (Ohio's provison of a parallel judicial remedy would not disqualify it as a deferral state under ADEA). While the NJLAD establishes the Civil Rights Division and authorizes it to remedy violations of the act, N.J.S.A. 10:5-6, it also allows claimants to bypass the Division and bring suit directly in Superior Court. N.J.S.A. 10:5-13. Still, we believe that invocation of the state judicial

remedy after a federal remedy is no longer available does not furhter the federal program. There are two basic purposes for deferral: (1) to provide rapid and more expeditious disposition of cases, including mediation rather than litigation, and (2) to avoid burdening the federal system. Neither of these federal purposes is fulfilled by reversing the sequence contemplated by the ADEA.

We are in the uncomfortable position of trying to predict how a federal court faced with this issue would resolve the quesiton. As noted, we do know that in the converse situation a shortened state period of limitations must yield to the paramountcy of federal law. Oscar Mayer, supra, 441 U.S. at 759-65, 60 L.Ed.2d at 619-21. We believe that, in the interest of uniformity, the

principle to be applied in this case is the same. The critical question is not whether the ADEA preempts the NJLAD in a suit brought in state court. The critical question is whether the suit brought under the longer period of limitation, without any state mediative process, furthers the goals of the ADEA so as to escape ERISA preemption. As noted, we think not. We therefore hold that ERISA preempts the plaintiffs' state claim because such preemption does not impair the ADEA.

In so holding, we believe that we are consistent with federal precedent subsequent to Shaw v. Delta Air Lines, Inc., supra. In Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. __, 85 L.Ed.2d 728 (1985), the Court addressed the insurance exception of section 514(b).

It adopted again a straightforward interpretation of the language of the act, noting that it had no choice but to "'begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" Id. at __, 85 L.Ed.2d at 740 (quoting Park 'n Fly, Inc. v. Dollar Park and Fly, Inc., __ U.S. __, 83 L.Ed.2d 582 (1985)). To state the obvious, the Court said, the Massachusetts law, which required insurance contracts to include a specified minimum mental health care benefit in health care insurance, was "a law which regulates insurance." 471 U.S. at __, 85 L.Ed.2d at 740-43, 752. It made no difference to the Court that ERISA plan administrators chose to effectuate their plans by purchasing insurance and declined to

impose any limitation on the saving clause beyond those Congress imposed on the clause itself. Id. at __, 85 L.Ed.2d at 741-42, 744; see also Children's Hosp. v. Whitcomb, 778 F.2d 239, 241-42 (5th Cir. 1985) (Metropolitan Life Ins. Co. v.Massachusetts established controlling interpretation so that state statute concerning self-insured plans was preempted by ERISA; critical aspect was that plan was uninsured).

Applying that rationale to this case, we would not give any meaning to the saving clause beyond that which Congress imposed on the clause itself. The clause itself preserves a state law only if its extinction would impair a federal law. Shaw v. Delta Air Lines, Inc., supra, 463 U.S. at 108-09, 77 L.Ed.2d at 508. A key factor is whether the plan

administrators are subject to inconsistent state regulation. See, e.g., Rebaldo v. Cuomo, 749 F.2d 133, 139 (2nd Cir. 1984), cert. denied, ____ U.S. __, 86 L.Ed.2d 718 (1985) (New York's version of hospital containment through Medicaid not superseded by ERISA; state control over hospital rates does not run counter to ERISA's aim of national uniformity 2/ in plan regulation).

2/ To achieve that national uniformity, it has been held that ERISA preempts substantive state-law claims based on a former employer's negligent handling of a benefit claim. Russell v. Massachusetts Mut. Life Ins. Co., 722 F.2d 482, 487-88 (9th Cir. 1983), rev'd on other grounds, 473 U.S. __, 87 L.Ed.2d 96 (1985) (holding that ERISA creates no private right of action). "ERISA does not supersede state regulation in other areas, (e.g. antidiscrimination laws) where the state law is coextensive with federal law." Id., 722 F.2d at 487 n.6 (citing Shaw v. Delta Airlines, supra). But see Sasso v. Vachris, 66 N.Y.2d 28, ____, 484 N.E. 2d 1359, 1363, 494 N.Y.S.2d 856, ___ (1985) (statute subjecting shareholders of closely-held corporations to personal

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We recognize that New Jersey has a strong policy against discrimination on the basis of age. In fact, our substantive law predates the federal law. We therefore respect the position advanced by the New Jersey Division on Civil Rights that our law against age discrimination is not preempted in these circumstances. Still, we believe that we are bound to yield to the paramount federal interest in uniformity expressed in Shaw v. Delta Air Lines, supra, and

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(Footnote Continued)
liability for failure to contribute to pensions not preempted by ERISA because law regulates employer rather than the plan itself).

its sequelae. We therefore hold that ERISA preempts the plaintiffs' untimely claim under the NJLAD.

IV

Defendant argues that regardless of the resolution of the ERISA preemption issue, plaintiffs' state claims must fail because Congress has insulated from challenge any alleged discrimination resulting from an employer observing "the terms of a bona fide seniority system or any bona fide employee benefit plan." See 29 U.S.C.A. §623(f)(2).

The judicial gloss on the provisions of the ADEA was well set forth in Patterson v. Independent School Dist. No. 709, 742 F.2d 465 (8th Cir. 1984). The Court in Patterson broke down the requirements for a plan to receive exemption as follows:

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1. The employer's action must "observe" [i.e. conform to] the terms of the plan.***

2. The plan must be a bona fide plan. This means that it must be a genuine employee benefit plan and not a sham. It must provide substantial benefits for employees.

* * * *

3. It must be an employee benefit plan; that is, it must provide benefits for employees.***

4. [T]here must be a plan in order to qualify for exemption under §623(f)(2).

* * * *

5. The plan must not be a subterfuge to evade the purposes of the statute to eliminate discrimination based on age. [Id. at 466-67 (citations omitted)]

In United Air Lines, Inc. v. McMann, 434 U.S. 192, 54 L.Ed.2d 402 (1977), the Supreme Court did not definitively resolve the interpretation of "subterfuge" but pointed out that in the context of the

federal Age Discrimination Act the phrase should be given its ordinary meaning as a "scheme, plan, stratagem, or artifice of evasion." Id. at 203, 54 L.Ed.2d at 413. In that case, however, the Court held as a matter of law that a bona fide plan adopted in 1941 with respect to airline pilots' retirement at age 60 cannot be a subterfuge to evade an act passed 26 years later. Id. It has been deduced, however, from the Court's willingness in United Air Lines, Inc. v. McMann to uphold involuntary retirements,[3] that "it follows

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[3] The main point decided in United Air Lines was that an involuntary retirment was permissible if pursuant to a bona fide plan that was not a subterfuge. United Air Lines, Inc. v. McMann, 434 U.S. 192, 203, 54 L.Ed.2d 402, 413 (1977). Subsequently, Congress amended the ADEA to make it clear that involuntary retirement within specified ages was not to be

a fortiori that a voluntary early retirement plan is permissible under §623(f)(2)." Patterson v. Independent School Dist. No. 709, supra, 742 F.2d at 467 (emphasis in original). The point was left open in Britt v. E.I. Dupont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985), where the court noted that "[w]e do not reach the issue of whether all bona fide voluntary retirement systems are protected under §623(f)(2)***." Id. at 595 n.4.

(Footnote Continued)
exempted from the provisions of the act. See 29 U.S.C.A. §623(f)(2) ("It shall not be unlawful***to observe the terms of a bona fide seniority system or ***employee benefit plan***except that***no such***plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual").

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The question of what constitutes a "bona fide plan" or "subterfuge" in this context has not evoked bright-line answers. See, e.g., EEOC v. Borden's, Inc., 724 F.2d 1390, 1397 (9th Cir. 1984) (since policy not part of "bona fide" plan, denial of severance pay and layoff income benefits to employees eligible for retirement benefits upon plant closing violates ADEA); Alford v. City of Lubbock, 664 F.2d 1263, 1271 (5th Cir.), cert. denied, 456 U.S. 975, 72 L.Ed.2d 848 (1982) (involuntary retirement with no pension benefits for plaintiffs who had been hired after their 50th birthdays part of a "bona fide" plan which was not "subterfuge" and thus did not violate ADEA). In view of our jurisdictional resolution, we do not resolve the issue.

Appendix A

For the reasons stated, the judgment of the Appellate Division is reversed and the judgment of the Superior Court, Law Division, dismissing plaintiffs' complaint, is reinstated.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock, Garibaldi and Stein join in this opinion.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2282-83T2

FRED S. NOLAN, RALPH R. BATTISTA, CHARLES W. CLEARY, JOSEPH A. DAVIS, WILLIAM J. DAVITT, JR., ANTHONY G. GOMES, JAMES HALLECK, DONALD C. HALLIWELL, PHYLLIS J. GORLEY KERKAWICH, JOSEPH M. KARKOSKY, JR., CHARLES KERR, PATRICK J. LARGEY, JR., ARMOND MACHADO, EDWARD M. McBRIDE, THOMAS P. NUGENT, PETER J. REILLY, HERMAN J. RUSSOMANNO, EUGENE A. SCANNEPICO, RAYMOND J. SMITH, JOHN T. STARR, HAROLD C. STOLL, LOUIS C. TREMBLE, JAMES VAN BRAMER, WALTER WARD and DANIEL M. WATSON,

Plaintiffs-Appellants,

v.

Appendix B

OTIS ELEVATOR COMPANY, a corporation organized and existing under the laws of the State of New Jersey,

Defendant-Appellee.

Argued November 7, 1984 -- Decided November 29, 1984

Before Judges Antell, J. H. Coleman and Simpson.

On appeal from Superior Court, Law Division, Hudson County.

William S. Greenberg argued the cause for appellants (Greenberg, Kelley & Prior, attorneys; Mr. Greenberg of counsel and on the brief and James F. Schwerin on the brief).

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John D. Horan and Peter F. Healey argued the cause for respondent Otis Elevator Company (Goodman, Stoldt, Breslin & Horan, attorneys; Mr. Horan and Mr. Healey on the brief).

Corinne L. McGovern, Deputy Attorney General, argued the cause for intervenor New Jersey Division of Civil Rights (Irwin I. Kimmelman, Attorney General of New Jersey, attorney; James J. Ciancia, Assistant Attorney General, of counsel and Ms. McGovern on the brief).

The opinion of the court was delivered by, ANTELL, P.J.A.D.

On December 31, 1980 defendant closed its Harrison plant, resulting in a significant reduction in its work force. A plan was formulated, known as The Harrison Special Supplemental

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Retirement Plan, under which managerial employees with a minimum of 25 years of service who were over 55 years of age could elect early retirement with substantial supplemental benefits. The plaintiffs herein, who also had a minimum of 25 years of service, but who were under 55 years of age, were awarded severance pay amounting to one week's salary for each year of service as was defendant's usual severance policy. These individuals were denied the benefits of The Harrison Special Supplemental Retirement Plan and brought this action under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. for relief in the form of termination benefits equal to those received by former employees who were over 55. An order for summary judgment

was entered in the Law Division in favor of defendant, from which plaintiffs now appeal, on the ground that the controversy is preempted by the federal Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §1144(a). ERISA is a regulatory enactment designed to protect the interests of employees and their beneficiaries in employee fringe benefits and to set standards and responsibilities for fiduciaries of those benefit plans. It does not deal with the subject of discrimination in the provision of employee benefits.

The order under review rests on §514(a) of ERISA, 29 U.S.C.A. §1144(a). That subparagraph preempts "...any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" regulated by ERISA.

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It is clear that the plan in question comes within the scope of the foregoing language. However, §514(d), 29 U.S.C.A. §1144(d), provides that the law shall not be "construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States ... or any rule or regulation issued under any such law." Plaintiffs argue before us, as they did in the Law Division, that because the effect of preemption of the New Jersey Law Against Discrimination would be to modify and impair the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C.A.§623(a)(1) & (2), the case is excepted from preemption by §514(d). The Law Division rejected this contention, reasoning that because the ADEA "is a self-contained independent statute [which] does not rely solely

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on state statutes for enforcement *** pre-emption of N.J.S.A. 10:5-1 would not 'impair or supersede' the ADEA." In the view of the Law Division this analysis was required by Shaw v. Delta Airlines, Inc., U.S. , 103 S. Ct. 2890, 77 L. Ed.2d 490 (1983).

The question before the court in Shaw v. Delta Airlines, Inc., supra, was whether an action brought under the New York Human Rights Law alleging discrimination on the basis of pregnancy was preempted by ERISA. The case arose before the effective date of the federal Pregnancy Discrimination Act of 1978, 42 U.S.C.A. §2000(e)(k), amending Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. 2000(e). Appellants there argued that by preempting the New York law the means by which Title

VII is enforced would be altered and the case therefore came within the exception created by §514(d). The Supreme Court noted that although the state law played a significant role in the enforcement of Title VII, the exception to preemption was only intended to apply to "nonconflicting state laws." U.S. at , S. Ct. at 77 L. Ed.2d at 503. Accordingly, the Court's decision that the state law was partially preempted by ERISA turned on the fact that the former prohibited a form of discrimination not prohibited by Title VII. As the court stated, preemption of state laws which "prohibit employment practices that are lawful under Title VII" would not impair Title VII within the meaning of §514(d). U.S. at , S. Ct. , 77 L. Ed. at 504.

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In this case the complaint rests on the factual contention that the discrimination claimed to be in violation of the New Jersey Law Against Discrimination also violates ADEA. Assuming, as we must for purposes of this appeal, that this contention will be supprted by the proofs, we are therefore not confronted by the obstacle to relief found in Shaw v. Delta Airlines, Inc., supra.

That preemption of the New Jersey Law Against Discrimination would impair federal law appears to be affirmatively answered by the reasoning of Oscar Mayer & Co. v. Evans, 441 U.S. 750, 99 S. Ct. 2066, 60 L. Ed.2d 609, (1979). There the Court decided that §14(b) of the ADEA, 29 U.S.C.A. §633(b), required the complainant to file a state action, where available, and wait a specified

number of days before bringing a federal action under the federal statute. This result was explained in the following language:

> We therefore conclude that §14(b), like §706(c) [of Title VII], is intended to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings. We further conclude that prior resort to appropriate state proceedings is required under §14(b), just as under §706(c). [441 U.S. at 756, S. Ct. , 60 L. Ed. 2d at 616].

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If prior resort to state proceedings is a condition precedent to filing a federal action under ADEA, it follows that preemption of such state proceedings by ERISA necessarily impairs or modifies the federal law. The dependency of the ADEA upon state law in enforcing federal prohibitions is further shown by the following language of §14(a) of the federal statute, 29 U.S.C.A. §14(a) of the federal statute, 29 U.S.C.A. §633(a):

> Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement

of action under this chapter such action shall supersede any State action.

We conclude that a sufficient interrelationship exists between the federal Age Discrimination in Employment Act and the New Jersey Law Against Discrimination so that preemption by ERISA of the state statute would result in impairment of the federal.

Defendant contends here that the action is barred by the time limitations expressed in the New Jersey Law Against Discrimination and the Statute of Limitations, N.J.S.A. 2A:14-2. In our view the requirement that the complaint be filed within 180 days after the alleged act of discrimination, N.J.S.A. 10:5-18, has reference only

to administrative proceedings initiated within the Division of Civil Rights. Moreover, we conclude that the applicable time limitation is that stated in N.J.S.A. 2A:14-1, "6 years next after the cause of action shall have accrued." On this view the action is timely brought.

Defendant's final contention is that the order for summary judgment was properly entered, notwithstanding plaintiffs' claims to the contrary, because the factual proofs will not support a finding of discrimination under the ADEA. It is settled that summary judgment should be denied unless the pleadings, depositions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to such judgment as a matter of law. R. 4:46-2; Judson

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v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). It is the movant's burden to exclude reasonable doubt as to the existence of a genuine issue of fact and all doubts must be resolved against the moving party. Ruvolo v. American Gas. Co., 39 N.J. 490, 499 (1963); United Advertising Corp. v. Metuchen, 35 N.J. 193, 196 (1961).

The factual allegations before us clearly present an instance of discrimination wherein individuals of one age category have been offered benefits not offered to those of another age group on the basis of age alone. See E.E.O.C. v. Bordens, 724 F. 2d. 1390, 1393 (9th Cir. 1984). The Age Discrimination in Employment Act provides at 29 U.S.C.A. §623(a) that it shall be unlawful for

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an employer

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age...

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In connection therewith, 29 U.S.C.A. §623(f)(2) provides that it shall not be unlawful for an employer to observe the terms of any "bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter..." As to this, plaintiffs claim that the benefit plan was not "bona fide," and that it was a subterfuge to avoid the purposes of the ADEA. Under these circumstances it has been held that an employee's motion for summary judgment requires the employer to make a prima facie showing that the plan does not serve the purpose of a subterfuge. Smart v. Porter Paint, 630 F. 2d. 490, 495 (7th Cir. 1980). We conclude that a resolution of these controverted

issues must depend upon factual findings which can only be reached upon a full record. In so saying, we do not imply that a plenary trial must necessarily result in a jury question or a material issue of fact.

> We only indicate the necessity in this case of a judge making the legal determinations on which the parties' rights hinge on a full and complete record. If, on a plenary hearing, the judge finds no factual issue present or finds a moving party is entitled to judgment as a matter of law, then judgment should be entered accordingly.
>
> [McGowan v. Borough of Eatontown, 151 N.J. Super. 440, 446 (App. Div. 1977).]

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Also, see Jackson v. Muhlenberg Hospital, 53 N.J. 138, 142-143 (1969), as to the important considerations of policy which are plainly implicated.

Reversed.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NO. L-050529-81

FRED S. NOLAN, RALPH R. BATTISTA, CHARLES W. CLEARLY, JOSEPH A. DAVIS, WILLIAM J. DAVITT, JR., ANTHONY G. GOMES, JAMES HALLECK, DONALD C. HALLIWELL, PHYLLIS J. GORLEY: KERKAWICH, JOSEPH M. KARKOSKY, JR., CHARLES KERR, PATRICK J. LARGEY, JR., ARMAND MACHADO, EDWARD M McBRIDE, THOMAS P. NUGENT, PETER J. REILLY, HERMAN J. RUSSOMANNO, EUGENE A. SCANNEPICO, RAYMOND J. SMITH, JOHN T. STARR, HAROLD C. STOLL, LOUIS C. TREMBLE, JAMES VAN BRAMER, WALTER WARD and DANIEL M. WATSON,	Civil Action ORDER FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT
Plaintiffs,	
v.	

APPENDIX C

OTIS ELEVATOR COMPANY, a corporation organized and existing under the laws of the state of New Jersey, Defendant.	:

This matter having been heard by the Court on the motion of defendant for a summary judgment pursuant to R. 4:46, and the Court having considered the argument of counsel and the memoranda of law submitted, and it appearing that defendant has a right to such a judgment as a matter of law, it is

On December 22, 1983

O R D E R E D that judgment be entered in favor of defendant and against plaintiffs for the reasons set

forth in the written opinion of the court filed simultaneously herewith.

/s/ Gregory J. Castano

GREGORY J. CASTANO, J.S.C.

APPENDIX D

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - HUDSON COUNTY
DOCKET NO. L-050529-81

FRED S. NOLAN, RALPH R. BATTISTA, CHARLES W. CLEARLY, JOSEPH A. DAVIS, WILLIAM J. DAVITT, JR., ANTHONY G. GOMES, JAMES HALLECK, DONALD C. HALLIWELL, PHYLLIS J. GORLEY KERKAWICH, JOSEPH M. KARKOSKY, JR., CHARLES KERR, PATRICK J. LARGEY, JR., ARMAND MACHADO, EDWARD M McBRIDE, THOMAS P. NUGENT, PETER J. REILLY, HERMAN J. RUSSOMANNO, EUGENE A. SCANNEPICO, RAYMOND J. SMITH, JOHN T. STARR, HAROLD C. STOLL, LOUIS C. TREMBLE, JAMES VAN BRAMER, WALTER WARD and DANIEL M. WATSON,	:	Civil Action OPINION
Plaintiffs,		

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v. :

OTIS ELEVATOR COMPANY, a :

corporation organized and :

existing under the :

laws of the State of :

New Jersey, :

Defendant. :

Decided: December 22, 1983

Greenberg, Kelley & Prior

By: William S. Greenberg

For Plaintiffs

Goldman, Stoldt, Breslin & Horan

By: John D. Horan

Reed, Smith, Shaw & Mc Clay

By: Peter F. Healey

For Defendant

CASTANO, J.S.C.

Appendix D

The impact of two federal statutes upon the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq, when the legality of a retirement benefit plan is challenged because of alleged age discrimination is the issue in this case. The federal laws involved are the Employment Retirement Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq.

Twenty-five former employees charge that a plan adopted by Otis Elevator Company (Otis) discriminates because of age, but their complaint frames the cause of action only in terms of a violation of the New Jersey statute. No breach of a federal statute is

pleaded.[1]

Otis contends that when a challenge to an ERISA plan is based on age discrimination, the New Jersey statute is pre-empted and that, therefore, a cause of action based upon N.J.S.A. 10:5-1 et seq, is not viable. I agree and grant the motion of Otis for summary judgment on that basis.

---

[1] No explanation has been offered as to why plaintiffs' complaint is cast solely under the state statute. It may be that plaintiffs have failed to comply with the administrative filing requirements which are a jurisdictional prerequisite. See Peper v. Princeton University Bd. of Trustees, 77 N.J. 55, 76 (1978).

Appendix D

I

The disputed plan was adopted in May of 1980 when Otis shut down its Harrison plant.

Termination benefits were provided for a group of non-union, salaried, managerial employees who had at least 25 years of service, but two separate categories of benefits were set up within the group. One category applied to those workers who were 55 years or older at the time of termination and the other to those who had not yet attained age 55 at that time.

Employees in both categories received medical and life insurance options, vacation pay and a limited bonus for the final weeks of service.

Those under 55 also received severance pay, calculated at the rate

of one week's pay per year of employment.

Those in the 55 and older category[2] did not receive severance pay. Instead, they became eligible immediately for benefits under a plan denominated the Harrison Special Supplemental Retirement Plan (HSSRP).

Under HSSRP, those over 55 receive 90 per cent of their final average annual earnings for a four-year period or until they attain the age of 62, whichever period is the longest for each individual employee. An especially attractive feature of the plan is that the 90 per cent benefit is calculated on the basis of income from all sources, including that derived from social security and from benefits payable under Otis' basic

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[2]Plaintiffs allege that 27 employees qualify under this category.

retirement plan. The basic plan remains in effect for members of both categories pursuant to vested rights they have in it.

The 25 plaintiffs all fall into the under-55 category. They contend they would have received benefits substantially in excess of the value of those actually received upon termination if they had received the same treatment as the over 55 group.[3]

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[3]The 25 plaintiffs allege that the amount of their individual benefit losses range from $73,000 to $167,000, but there is no explanation of the calculation which leads to that result.

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II

The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. was first enacted in 1945 and has been supplemented a number of times since. Originally, it was aimed at discrimination because of race, color, religion, sex or national origin. In 1962, discrimination because of age was added to the list of proscribed practices.[4]

---

[4] N.J.S.A. 10:5-12 now provides in part:

> It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:
>
> a. For an employer because of the ***age ***of any individual ***to discriminate against such individual in compensation or in terms, conditions or privileges of employment ***.

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Similarly, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 et seq, as originally enacted, prohibited discrimination in employment on the grounds of race, color, religion, sex or national origin only. It did not deal with age discrimination. The void was filled, however, when Congress adopted the ADEA.

The ADEA makes it unlawful for an employer to discriminate against any individual between the ages of 40 and 65 with respect to compensation because of age. Age classifications which adversely affect employee status are proscribed. 29 U.S.C. § 623 (a).

On the other hand, ERISA has nothing to do with discrimination, either by reason of race, color, religion, sex, or national origin or by reason

of age. It is designed to promote the interest of employees and their beneficiaries in employee fringe benefit plans. Alessi v. Raybestos - Manhattan, Inc., 451 U.S. 504, 510 (1981). With comprehensive standards which regulate reporting, disclosure and fiduciary responsibilities, it imposes participation, funding and vesting requirements on pension and welfare plans.

By its explicit terms, ERISA pre-empts any statute which may "relate to" any employee benefit plan. 29 U.S.C. § 1144 (a)[5]. However, there are certain

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[5] 29 USCA § 1144 (a) provides that:

> Except as provided in sub-section (b) of this section, the provisions of this title

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specified exceptions. 29 U.S.C. § 1144 (b).

Exempt from pre-emption are state laws regulating insurance, banking or securities, state criminal laws and plans maintained solely for the purpose of complying with applicable workmen's compensation or disability insurance

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and Title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4 (a) and not exempt under section 4 (b).

laws. The Act also provides that:

> * * *nothing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States * * * or any rule or regulation issued under such law. 29 U.S.C. § 1144 (d)

III

The first determination to be made here is whether the New Jersey statute "relate[s] to" employee benefit plans.

Obviously, N.J.S.A. 10:5-1 et seq does not deal specifically with ERISA plans. It deals comprehensively with discrimination.

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Notwithstanding, the pre-emption provision in ERISA pre-empts all state statutes insofar as they "relate to" plans covered by ERISA even though they may not have been designed by the state legislatures with employee benefit plans particularly in mind. "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., U.S. 103 Sup. Ct. 2890, 2900 (1983).[6]

---

[6]Although the claim in Shaw was for discrimination because of pregnancy, one of the statutes involved, the New York Human Rights Law, N. Y. Exec. Law § 296.1 (McKinney 1982 and Supp 1982-3), which was the subject of an

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Obviously, the discrimination which plaintiffs allege to have resulted here has a connection with an employee benefit plan. As it would be applied in this case, therefore, N.J.S.A. 10:5-1 "relate[s] to" an employee benefit plan.

Consequently, the New Jersey Law Against Discrimination in the context in which it arises in this case is pre-empted by ERISA unless one of the exceptions in ERISA saves it from pre-emption.

ERISA pre-emption claim, was nearly identical in language to N.J.S.A. 10:5-1.

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IV

Most of the exceptions manifestly do not apply.

N.J.S.A. 10:5-1 does not regulate insurance, banking or securities and it is not a state criminal law. It is not maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance law.

The only way an exception might possible be carved out, therefore, would be if pre-emption of N.J.S.A. 10:5-1 would be found to "alter, amend, modify, invalidate, impair or supersede any law of the United States."

That approach was attempted in Shaw, supra, in a similar context. Plaintiffs there argued that a state

statute enforced Title VII of the federal Civil Rights Act and that, for that reason, pre-emption of it would "impair and modify" Title VII. The Supreme Court disagreed, declaring that Title VII does not transform all state fair employment laws into federal laws just because state laws play a significant part in the enforcement of Title VII.

The Court pointed out that since Title VII does not itself prohibit any specific practice a state statute, when it prohibits a particular practice, is not enforcing Title VII. As a result, Title VII would not be undermined by pre-emption and such a state statute would not be saved from pre-emption.

Since age discrimination is covered by the ADEA and not Title VII, in this case it is necessary to examine

the interaction of N.J.S.A. 10:5-1 and the ADEA to determine whether pre-emption of the New Jersey statute would "impair or supersede" the ADEA.

The ADEA is a self-contained, independent statute. An age discrimination claim by individuals between the ages of 40 and 65 is cognizable and enforceable under its provisions whether or not the local jurisdiction has enacted an age discrimination statute and it does not rely solely on state statutes for enforcement. 29 U.S.C. § 626.

Consequently, pre-emption of N.J.S.A. 10:5-1 would not "impair or supersede" the ADEA. The federal law would not be affected at all.

Since none of the exceptions to pre-emption enumerated in ERISA apply

to an age discrimination challenge to an ERISA plan by employees in the 40 to 65 age bracket, the Law Against Discrimination is not saved from pre-emption by ERISA.[7]

---

[7] This court does not rule on the interaction or relationship of ADEA and the New Jersey Law Against Discrimination in actions which do not involve alleged discrimination in ERISA covered plans, or which invalue [sic] employees under 40 or over 65.

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Since plaintiffs have elected to pursue whatever age discrimination cause of action they might have only under the pre-empted statute and not under the ADEA,[8] Otis is entitled to judgment as a matter of law. Its motion for summary judgment is granted.

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[8]The ADEA would not be pre-empted by ERISA, but it may not be applicable otherwise.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CIVIL 82-1888

August 12, 1982

FRED S. NOLAN, et als., Plaintiffs,

vs.

OTIS ELEVATOR COMPANY, Defendant.

ORDER

For the reasons set out in the Opinion of even date,

It is on this 12th day of August, 1982,

ORDERED, that

1. The case is hereby remanded to the Superior Court of New Jersey, as having been removed improvidently and without jurisdiction, 28 USC §1447(c).

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2. No costs or attorneys fees are allowed.

3. The clerk is authorized to return the deposit of $500 made June 16, 1982, in lieu of a removal bond, to the defendant's attorney of record.

s/ Vincent S. Giunno, U.S.D.J.

Original to Clerk

xc: All counsel

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEW JERSEY

Civil No. 82-1888

August 12, 1982

FRED S. NOLAN, et als., Plaintiffs,

vs.

OTIS ELEVATOR COMPANY, Defendant.

Appearances:

Greenberg, Kelley & Prior, Esqs.
by William S. Greenberg, Esq. and
James F. Schwerin, Esq. (Trenton)
for plaintiffs

Goodman, Stoldt, Breslin & Horan, Esqs.,
by John D. Horan, Esq. (Hackensack)
attorneys; Peter F. Healey, Esq. and
William P. Peterson, Esq. (D.C.)
of counsel, for defendant.

OPINION

BIUNNO, Senior District Judge.

This is a case removed here from

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Superior Court of New Jersey, in which the court initiated inquiry by order to show cause on the question whether the case was removed improvidently and without jurisdiction so as to require its remand under 28 USC §1447(c).

The case is not removable under diversity jurisdiction because defendant has dual citizenship in New Jersey (where is was incorporated) and Connecticut (where its principal palce of business is located, see 28 USC &1332(c), and 28 USC §1441(b), last sentence. Only defendants who are not citizens of the forum may remove a case on diversity grounds. Beyond that, all but one of the plaintiffs appear to be citizens of New Jersey.

Thus, removal is grounded (if it can be sustained at all) on grounds

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that the case "arises under" the Constitution, law or treaties of the United States, 28 USC §1331(a), or under an Act of Congress regulating commerce, 28 USC §1337.

The complaint, which is by 25 named plaintiffs, alleges that all the plaintiffs were employees of defendant Otis, were employed in management positions, and were not represented by any labor union. It says that during 1980, all plaintiffs were terminated as part of a reduction in force effected for financial reasons at the Harrison plant, with a final work date of May 16, 1980. [NOTE: the Answer alleges that only 20 plaintiffs were so terminated; it says that four were transferred to another facility at Yonkers, N.Y. and were later terminated, or retired, while a fifth went on sick-

leave and then retired on disability pension. Assuming these allegations to be true, the case asserted by the other 20 remains unaffected].

The complaint alleges that each plaintiff had 25 or more years of service with Otis at termination, and that each was under 55 years of age, and received a severance benefit of 1 week's pay for each year of service.

It says that "other employees" who had 25 years' or more service were terminated but who were 55 years of age or older, received "benefits greatly exceeding those paid to plaintiffs." It does not say whether the "other employees" were also management employees not represented by a labor union, nor does it say whether the other employees received a severance benefit plus some other kind of benefit, or no severance benefit but some other kind of benefit instead.

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What it does say, for each plaintiff, that had the individual been 55 years or more old, and was treated as were those of that age, each would have received benefits worth $X more than was paid (each amount being in excess of $10,000).

It then alleges that Otis' action in paying greater benefits to those 55 years of age or more, with 25 years or more of service, than was paid to those under 55 with like service, was an unlawful discrimination as to a term, condition or privlege of employment because of age, in violation of NJSA 10:5-12(a), and claim is made for the differential.

Whether or not the claims are valid ones under State law is not the question here. New Jersey statutes dealing with various kinds of discrimination under various circumstances are quite old, going back to the 1800's. The

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The modern Law Against Discrimination originated as NJPL 1945, c.169, and was designed to fulfill guarantees of civil rights provided in the Constitution of 1844, which were continued in the Constitution of 1947, as well as in exercise of the police power and to promote the general welfare, see N.J.S.A. 10:5-2.

N.J.Const. 1844, Art. I, par. 1, declared the natural and inalienable right of pursuing and obtaining safety and happiness. Art. 1, sec. 4, declared that no person was to be denied the enjoyment of any civil right, merely on account of his religious principles. N.J. Const. 1947, by Art I,par. 1, continued the happiness clause, and enlarged the civil rights clause in Art. I, par. 5, to forbid discrimination

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because of religious principles, race, color, ancestry or national origin.

The New Jersey Law Against Discrimination did not list age, marital status or sex as forbidden criteria in various contexts. these were added later by amendment.

At the time "age" was added as a forbidden criterion in employment contexts but not for other circumstances, the act was also amended to include what is now N.J.S.A. 10:5-2.1, which provided in part that nothing in the Law Against Discrimination is to be construed "to interfere with the operation of the terms or conditions and administration of any bona fide retirement pension, employee benefit or insurance plan or program." See N.J.P.L. 1962, c. 37.

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These features, of course, do not tend to disclose that the case "arises" under any federal source of law. They deal only with state law, and provide no basis for removal.

The petition for removal asserts other facts. It asserts that the Harrison plant was shut down solely for financial reasons, its physical plant and equipment sold and employees terminated. It says that under a deferred compensation plan established for the Harrison plant, management employees not represented by a labor union who were 55 years of age or over and who had 25 years or more of service, were paid a special supplemental retirement benefit. This benefit is said not to have been payable to the terms of the plan to the plaintiffs as they were under age 55.

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The petition asserts that plaintiffs cannot state a valid cause of action under state law because, by federal law the subject is preempted by ERISA, 29 USC §1001, et seq. If they have claims at all, it is argued that they arise under either ERISA or the federal Age Discrimination in Employment Act (ADEA), 29 USC §921, et seq.

Alternatively, it is said that ERISA preemption involves interpretation of that law and ultimately the Supremacy Clause, both of which are said to unavoidable, which go to the heart of the validity of the claims.

As a second alternative it is argued that the claims arise exclusively under ERISA as an action by "participants" or "beneficiaries" to recover benefits or enforce rights under the terms of

a plan, 29 JSC §1007(7) and (8).

While it is conceded that ADEA itself contains no preemption provision in respect to state laws on age discrimination, it is argued that ERISA and ADEA taken together have this effect, and that as a consequence, the real nature of the claim is federal despite the plaintiffs' characterization of it, or that the claim is one that is exclusively governed by federal law so that plaintiffs are necessarily stating a federal cuase of action no matter whether it is so articulated or not. See, e.g., such cases as Burgess v. Charlottesville, etc., 477 F.2d 40(CA 4, 1973); Romick v. Bekins Van etc., 197 F.2d 369 (CA 5, 1952); Johnson v. England, 356 F.2d 44 (CA 9, 1966).

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This is not the situation in this case. Plaintiffs' complaint states, and is intended to state, a claim under the state statute only. No claim is made under ERISA or under ADEA. The federal questions or preemption, and the like, even assuming they are valid, are raised as defenses and to support the counterclaim for declaratory judgment. This does not provide a basis for removal, see Madsen v. Prudential Federal S & L, 635 F.2d 797 (CA 10, 1980), cert. den.; Stone v. Stone, 632 F.2d 740 (CA 9, 1980), cert. den.; First Natl etc. v. Aberdeen etc., 627 F.2d 843 (CA 8, 1980).

There is no need to review here the entire history of the removal statutes since the first Judiciary Act of 1789. It is sufficient to note

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that since the Act of March 3, 1887, from which the present statute, 28 USC §1441 is derived, removal is not authorized in a case where the federal question is a matter of defense. See State of Tennessee v. Bank of Commerce, 152 US 511 (1894). Only a defendant may remove, Chicago, etc. Co. v. Stude, 346 U.S. 574 (1954), and so even a plaintiff who sues in state court and has a federal counterclaim asserted against him cannot remove, Oregon, etc. v. Andrews, 458 F.2d 382 (CA 9, 1972).

Another leading case is Gully v. First Natl Bank, 299 U.S. 109 (1936), where the suit sought to be removed was to collect taxes under state law from a national bank, and was ordered remanded even though the state's power

to levy the tax depended on federal law.

See, also, Shamrock, etc v. Sheets, 313 U.S. 100 (1941) which precludes a plaintiff against whom a counterclaim is asserted from removing under the statute.

No doubt there has been considerable debate about altering these principles, as in the ALI Study of the Division of Jurisdiction, etc., adopted in 1965 and 1968 (Philadelphia 1969). The text of §1312 (a) there proposed would have allowed removal by a defendant on the basis of a federal defense or counterclaim, as well as by a plaintiff against whom a federal counterclaim was asserted, among others. The drafters' note says:

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> "Subsection (a) is a major change in present law. To allow removal on the basis of a federal defense or counterclaim is new."

The proposed draft has never been enacted, and is not law this court can apply.

Quite evidently, plaintiffs have sued in state court to make a state claim if it can be made. They may recognize that they have no federal claim or at least choose not to assert any. The federal defenses raised by Otis may preclude any recovery under state law. If so, that is a result to be achieved in the state court and provides no basis for removal here. On the other hand, there may turn out to be an area of state law for which federal law does not control. If that be the case, then that claim surely

does not "arise" under federal law and cannot be removed. The age laws are different in various respects. The state law governs in the areas of employment, boycotts and credit transactions. The federal law applies only in employment. The state law applies from age 18 on up, with no upper limit. The federal law originally applied to ages 40-65, and was amended to ages 40-70.

There is no precedent binding on this court dealing with the interplay between ERISA, ADEA and a state age discrimination law. Under all these circumstances, the court cannot say that the complaint asserts a federal claim disguised as a state claim by artful pleading. Whether the asserted state claim has any validity is a matter

of defense. The Superior Court may conclude that the direction of NJSA 10:5-2.1 precludes recovery without regard to federal law.

Otis also argues that even if the complaint be remanded, jurisdiction should be retained over the counterclaim because it has an independent basis for federal jurisdiction. The precedents cited from the Court of Appeals in this circuit do no support the proposition. Neither Rengo v. Molins, 657 F.2d 535 (CA 3, 1981), nor National Research v. Bartholomew, 482 F.2d 386 (CA 3, 1973) was a removal case and so neither addresses the question involved here. Ferguson v. Eakle, 492 F.2d 26 (CA 3, 1973) was a removal case, but there was no issue of improvident removal or lack of jurisdiction. Rather, after

an answer and counterclaim there was a dismissal under F.R.Civ.P. 41 so far as the complaint was concerned, and Rule 41 itself requires retention of the counterclaim under those conditions.

The difficulty with the argument is that it ignores the matter of jurisdiction. The district courts are of limited statutory jurisdiction. If a case be removed improvidently and without jurisdiction under the removal statute, no jurisdiction is obtained by the filing of a counterclaim even though it states a federal claim.

In arriving at its conclusions, the court takes care to note that it has expressed no view on the opposing views presented on the merits of the federal defense, or, for that matter, on the possible inapplicability of

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of the state statute sued on in light of the 1962 declaration, enacted at the same time that "age" was added to some parts of the statute, barring interference with any bona fide retirement, pension, employee benefit or insurance plan or program, NJSA 10:5-2.1, a provision of the same nature as that in ADEA, 29 USC 623(f)(2).

Plaintiffs also seek the allowance of attorneys fees and costs. Precedents in other circuits are relied on for the proposition that attorneys fees are allowable on remand for improper removal. No claim is made that they are allowable here under Roadway Express v. Piper, _____ US _____, 65 L.Ed. 2d 488 (1980).

Assuming there is such authority (which the court need not decide),

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it is admittedly within the sound discretion of the court to make such allowance.

The court exercises its discretion is disallow costs, or attorneys fees. The matter was raised by the court on its own initiative, and most of the plaintiffs' brief, which was nearly double the maximum length allowed by General Rule 27 of this district was addressed to the merits of Otis's alleged federal defenses, a subject which this court could not deal with unless removal was proper.

This conclusion is that the case was removed improvidently and without jurisdiction, and so must be remanded to Superior Court of New Jersey as required by 28 USC §1447(c).

s/Vincent P. Biunno, U.S.D.J.

Original to Clerk
xc: All Counsel

Supreme Court, U.S.
FILED
JUN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRED S. NOLAN, et al.,

Petitioners,

vs.

OTIS ELEVATOR COMPANY and the ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

---

BRIEF OF RESPONDENT OTIS ELEVATOR COMPANY IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Where the Supreme Court of New Jersey ruled unanimously that the ADEA is not impaired by ERISA preemption of petitioners' direct age discrimination suit under the New Jersey Law Against Discrimination—because the suit relates to an employee benefit plan, would be time-barred under the ADEA and was filed without prior recourse to the available mediative processes of the New Jersey Division on Civil Rights—is there any basis for review by this Court?*

---

* Petitioners' statement of Questions Presented is overbroad and incorrect. Because of its ruling that the direct suit enforcement provision of the New Jersey Law Against Discrimination was preempted, and with it petitioners' claim, the New Jersey Supreme Court did not have to, and did not in fact, resolve the merits of the underlying employment practice challenged, although it did note "... the apparent impediments to [the] claim posed by the savings provisions of ... [section 4(f)(2) of] the federal Age Discrimination in Employment Act." Pet. App. 3. The legality of respondent's plan thus is not an issue ripe for review. In any event, as we demonstrate in part III, *infra*, the plan at issue is plainly lawful under controlling federal standards.

PARTIES IN THE SUPREME COURT OF NEW JERSEY

Otis Elevator Company**

Fred S. Nolan, *et al.* (Pet. ii)

Attorney General of New Jersey as Intervenor

** Respondent Otis Elevator Company is a wholly-owned subsidiary of United Technologies Corporation. Excluding its wholly-owned subsidiaries, the subsidiaries of Otis Elevator Company are:

Asenseurs Gendre Otis S.A.; Val-Lift S.A.; Ascensores Otis S.A.; China Tianjin Otis Elevator Company Ltd.; Elevadores en Servicio, S.A. de C.V.; Caricor Ar Condicionado e Refrigeracao de Brasil Ltda.; Freissler Otis G.m.b.H.; National Trading Corporation S.A.L.; Nippon Otis Elevator Company; Sito Realty Company, Inc.; Otis Elevator Company (Kuwait); Otis Elevator Company (H.K.) Limited; Otis Elevator Company (India) Limited; Otis Elevator Company Limited (South Africa); Guide Rails Pty. Ltd.; Otis Elevator Company S.A.E. (Egypt); COMPORTEL, S.A.R.L.; Otis Elevator Saudi Arabia Ltd.; Otis Europe S.A.; Ascendes S.A.; Ascenseurs Dunet S.A.; Ascenseurs Walter Sangalli, S.A.; Establissements Camus; Otis Maroc S.A.; SARI Otis (Gestion), S.A.; SARI Otis (Maintenance), S.A.; Flohr-Otis Aufzuege G.m.b.H.; Brinkman Liften B.V.; Ascenseurs Clerebout S.A.; Essener Aufzugsfabrik Bruno-Haack G.m.b.H.; Stigler Otis, S.p.A.; Tatung Otis Elevator Company; Carrier-U.K. Distribution Limited; Zardoya Otis, S.A.; Angulo S.A.; ELEMA S.A.

The following subsidiaries of United Technologies Corporation are significant subsidiaries within the meaning of Regulation SX of the Securities and Exchange Commission's General Accounting Regulations:

United Technologies Automotive Holdings, Inc.; Carrier Corporation; Essex Group, Inc.; Norden Systems, Inc.; Otis Elevator Company; Otis Europe, S.A.; Pratt and Whitney Canada, Inc.; United Technologies Financial Services.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1958

FRED S. NOLAN, et al.,

Petitioners,

vs.

OTIS ELEVATOR COMPANY and the ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

On Petition For a Writ of Certiorari to the Supreme Court of New Jersey

---

BRIEF OF OTIS ELEVATOR COMPANY IN OPPOSITION TO CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of New Jersey review of which is sought is reprinted in Appendix A to the petition at 1a—50a, cited herein as "Pet. App. ___a.".

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTES INVOLVED

In addition to the statutes set forth in the petition, this case also involves sections 14(a) and (b) of the federal Age Discrimination in Employment Act (29 U.S.C. §§ 633(a), (b)), sections 10:5-13, 5-14 and 5-18 of the New Jersey Law Against Discrimination, and N.J.S.A. § 2A:14-1. These provisions are set forth in Appendices A-C hereto.

COUNTERSTATEMENT OF THE CASE

In this state law age discrimination suit, petitioners claim that during a reduction in force prompted by adverse business conditions in late 1979, respondent Otis Elevator Company ("respondent") unlawfully gave greater benefits to older workers in a voluntary supplemental early retirement incentive plan than it provided to younger workers by way of severance pay when the facility subsequently closed in December, 1980. Pet. App. 3a, 4a-5a, 7a, 12a. That plan—the Harrison Special Supplemental Retirement Plan or "HSSRP"—was designed to encourage early retirement so as to reduce the impact of the reduction on the older workers and to make remaining employment opportunities available to persons in petitioners' age bracket. *Id.* 7a–8a.

Integral to the HSSRP was its incentive feature, which consisted of a supplemental layer of early retirement benefits over and above the normal benefits and a limited "window" period by which eligibility was defined. The supplemental benefits were keyed by formula to the amount of early retirement benefits payable under the Otis Basic Retirement Plan for

Salaried Employees ("OBRPSE").[1] To qualify for the HSSRP, employees had to achieve eligibility for early retirement under the OBRPSE (i.e. have 25 or more years of service and be age 55 or older) by June 30, 1980, the end of the "window" period, and elect to retire early under the OBRPSE. *Id.* 6a-7a, 11a-12a.

Petitioners are a group of former salaried managerial employees who met the length of service but not the attained age criterion of the HSSRP by the "window" cut-off date of June 30, 1980. *Id.* 4a. That is, as of June 30, 1980, none of the petitioners was eligible to retire early under the OBRPSE and, accordingly, there was no way to open the HSSRP to them under the terms of the plan. Following the respondent's decision in May, 1980 to close the plant by the end of 1980, petitioners received severance benefits of one week's salary for each year of service, and miscellaneous other benefits. *Id.* 4a, 12a. All petitioners have vested pension benefits under the OBRPSE which become payable when they attain the plan's various eligibility ages and elect to begin receiving payments. *Id.* 5a.

On May 12, 1982, petitioners filed a complaint of age discrimination in the New Jersey Superior Court of Harrison County pursuant to the right of direct suit in N.J.S.A. § 10:5-13, New Jersey Law Against Discrimination ("NJLAD", N.J.S.A. § 10:5-1 *et seq.*). *Id.* 13a. By electing to proceed directly to Superior

[1] The HSSRP is a nonqualified deferred compensation plan for management employees within the meaning of ERISA and U.S. Labor Department pronouncements. 29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1); *see, e.g.* U.S. Dept. of Labor Opin. Nos. 75-48 (Dec. 23, 1975), 75-64 (Aug. 1, 1975), and 75-63 (July 22, 1975).

Court, petitioners bypassed entirely the New Jersey Division on Civil Rights ("NJDCR"), the state counterpart to the federal Equal Employment Opportunity Commission ("EEOC"), which is authorized to investigate promptly age discrimination charges, to determine probable cause and to resolve charges through voluntary means including ". . . conference, conciliation and persuasion." N.J.S.A. § 10:5-13, 5-14; 29 U.S.C. § 626(d).[2]

Following removal to and remand on procedural grounds from the United States District Court for the District of New Jersey, the Superior Court of New Jersey granted respondent's motion for summary judgment on the basis that preemption of petitioners' NJLAD claim does not "alter, amend, modify, invalidate, impair or supersede" the ADEA within the meaning of section 514(d) of ERISA, 29 U.S.C. § 1144(d).[3] The Appellate Division reversed, holding, *inter alia,* that the applicable time limitation for petitioners' suit under N.J.S.A. § 10:5-13 is six years. N.J.S.A. 2A:14-1; Pet. App. 63a. On certification, the Supreme Court of New Jersey reinstated the judgment of the Superior Court dismissing the complaint but did not disturb the Appellate Division holding with respect to the applicable NJLAD statute of limitation. *Id.* 40a, 50a.

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[2] An administrative charge by petitioners under the NJLAD on May 12, 1982 would have been time barred since administrative charges under the NJLAD must be filed within 180 days after the alleged discriminatory event. N.J.S.A. § 10:5-18.

[3] For the sake of brevity, the ERISA section 514(d) language will be summarized hereinafter simply by use of the word "impair." The full relevant text is quoted at Pet. App. 4-5.

In a unanimous ruling, the Supreme Court of New Jersey held that, as both lower courts found and the parties agreed, petitioners' NJLAD claim "relates" to a plan, the HSSRP, which is an employee benefit plan within ERISA's meaning. 29 U.S.C. §§ 1002(3), 1144(a); Pet. App. 19a-20a, 55a-56a, 83a-85a. Petitioners' claim is thus preempted unless preemption would "impair" a federal law, here the ADEA. 29 U.S.C. § 1144(d); Pet. App. 20a. Since petitioners' direct suit under the NJLAD filed on May 12, 1982 concededly was barred under the ADEA (Pet. 25), the Court defined the issue as ". . . whether the suit brought under the longer [six year] period of limitation, without any state mediative process, furthers the goals of the ADEA so as to escape ERISA preemption." *Id.* 40a, 29a-30a. Stated another way, under the clear language of ERISA Section 514(a) and this Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), "the question of the availability of the state remedy sought turns on whether it is necessary to the continued life of the federal program." Pet. App. 25a. Answering each of these questions in the negative, the Court held that preemption by ERISA of petitioners' defunct ADEA claim does not impair the ADEA. *Id.* 3a.[4]

REASONS FOR DENYING THE WRIT

Summary Of Argument

In its unanimous opinion, the Supreme Court of New Jersey correctly held that in this age discrimi-

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[4] Contrary to petitioners' assertion (Pet. 19), respondent argued before both the Supreme Court of New Jersey and the Appellate Division that due to the preemptive effect of ERISA, petitioners' NJLAD suit is barred, *inter alia*, because untimely under the ADEA.

nation suit relating to an employee benefit plan, petitioners cannot, under the rubric of state law, seek relief from which inarguably they are foreclosed under the enforcement provisions of the federal ADEA. The claim is barred by the ADEA because it was filed outside the time limits of the ADEA and for the additional reason that petitioners failed to activate the ADEA enforcement scheme by first filing an administrative charge with either the state (NJDCR) or federal (EEOC) administrative agency, thereby negating any possibility of a mediated resolution of the controversy. In holding petitioners' claim preempted, the court below followed *to the letter* the clearly-expressed intent of Congress in ERISA section 514, 29 U.S.C. § 1144, as held by this Court to apply in the employment discrimination context in the landmark case of *Shaw v. Delta Airlines, supra.* The arguments made by petitioners, in contrast, stand ERISA section 514 on its head by asking that a claim extinguished by federal law be resurrected under state law.

The court below properly recognized that the ADEA does not depend in the least for its enforcement on a claim brought pursuant to N.J.S.A. § 10:5-13, which allows direct access to the courts at any time within six years. Under the *federal* enforcement scheme, the role of New Jersey, like that of any other state, is limited to providing an investigatory and mediative mechanism under the auspices of its administrative agency, the NJDCR, prior to litigation. That part of New Jersey's enforcement scheme upon which the ADEA thus depends not only is narrow but also was never activated by petitioners even though, under the ADEA, state agency process is to be invoked within,

at most, 300 days of the alleged discriminatory act. Pet. App. 28a-29a, 35a-45a.

The very limited preemption found by the court below does not in any way produce a ". . . disruption of the enforcement scheme contemplated" by the ADEA nor ". . . change the means by which [the ADEA] is enforced." *Shaw, supra,* 463 U.S. at 101, 102. All the decision requires of age discrimination claimants in New Jersey is that, if their claim relates to an employee benefit plan, they file a charge with the state agency within 300 days and prior to commencing a lawsuit, thus observing the federal requirement in the ADEA. The decision leaves New Jersey's role in the ADEA's enforcement scheme completely intact because it does not affect the status of the New Jersey Division on Civil Rights as a "deferral" agency under the ADEA or its ability to enforce the NJLAD in cooperation with the EEOC, even as to charges relating to employee benefit plans. Preemption was, under *Shaw,* both mandatory and correct, and the petition for a writ of certiorari should therefore be denied.[5]

I. Due To The Dominant Federal Interest In Consistent State and Federal Regulation of Employee Benefit Plans, Petitioners' Concededly Extinct Claim Under The ADEA Cannot Be Resurrected Under New Jersey Law

In a series of recent decisions, this Court repeatedly has emphasized the sweeping nature of the preemption provision in ERISA section 514(a), 29 U.S.C.

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[5] Petitioners' arguments as the legality of the plan under the ADEA are addressed in the Comments section hereof at pp. 18-23, below.

§ 1144(a). Although in *Shaw* the issue was preemption of a substantive rule of New York law inconsistent with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Supreme Court of New Jersey correctly ". . . perceive[d] in *Shaw* an underlying principle in favor of uniformity of administration of benefit plans." Pet. App. 23a. That principle, in turn, required preemption of petitioners' direct suit which, although filed within the applicable six year period of limitations of the NJLAD, was extinct under the ADEA. As *Shaw* followed Congress, so the court below followed *Shaw*, and the essence of its decision was simply and succinctly put: "How can it be said that the federal right 'depends on' the state program . . . when in a given case in the federal right has expired?" *Id.* 29a, *citing Shaw,* 463 U.S. at 103.

Nothing new is established by the New Jersey court's preemption of a limited portion of the NJLAD's remedial scheme. Contrary to petitioners' suggestion (Pet. 23), preemption is not confined to rules of state substantive law that conflict with their federal counterparts, even where preemption is implied. Given the interest in federal uniformity that the doctrine is designed to protect, preemption extends, quite naturally, to inconsistent state law enforcement and remedial provisions as well. *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 241–42, 247 (1982).[6] This principle applies *a fortiori*

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[6] Even in the absence of an explicit preemption provision such as that in ERISA, under the Supremacy Clause of the Constitution this Court has found preemption of state laws whose procedures conflict or interfere with a federal regulatory scheme. Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 505-06 (1956). This rule applies even when federal law envisions

in the context of ERISA preemption, which is not only an *express* assertion of federal supremacy but also perhaps the *broadest* preemption provision ever enacted by Congress. *Shaw,* 463 U.S. at 96-97 and n.15. The court below correctly noted that ERISA's preemptive reach is as broad as its language, Pet. App. 21a, citing *Shaw,* 463 U.S. at 98, and that in enacting ERISA's "comprehensive and reticulated" provisions, "Congress took nothing for granted." Pet. App. 16a, 18a, *quoting Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980); *Alessi v. Raybestos Manhattan, Inc.*, 451 U.S. 504 (1981).

The need for preemption of inconsistent enforcement provisions of state law, when used to support claims relating to employee benefit plans, is strongly evidenced in the statements precisely to that effect by the principal congressional sponsors of ERISA, relied upon by this Court in *Shaw.*[7] In that decision,

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some role for state law. San Diego Building Trades Council v. Garmon, *supra;* Edgar v. Mite Corp., 457 U.S. 624, 630-40 (1982); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 579 (1981).

[7] "It should be stressed that with the narrow exceptions specified in the bill, the *substantive and enforcement* provisions of the conference substitute are intended to preempt the field for Federal regulation, *thus eliminating the threat of conflicting or inconsistent State and local regulation* of employee benefit plans." 120 Cong. Rec. 29933 (1974) (remarks of Senator Williams). "Finally, I wish to make note of what is to many the crowning achievement of this legislation, *the reservation to Federal authority the sole power to regulate the field of employee benefit plans.* With the preemption of the field, we round out the protection afforded participants *by eliminating the threat of conflicting and inconsistent State and local regulation.*" *Id.* at 29197 (Statement of Rep. Dent.), *quoted in* Shaw, *supra,* 463 U.S. at 99 (emphasis added).

the ERISA savings clause in 29 U.S.C. § 1144(d) was held to be a very narrow and specific one and limited to those ". . . state laws *upon which federal laws depend for their enforcement.*" *Shaw*, 463 U.S. at 104 (emphasis added). This Court invalidated so much of the New York pregnancy discrimination law that expanded the rights accorded under Title VII because, even with that limited preemption, Title VII "would . . . be enforced in precisely the same manner." *Id.* at 103.

Taking these predominant federal interests into account and informed by the teaching of *Shaw*, the Supreme Court of New Jersey properly recognized that the availability of relief to petitioners under the NJLAD must be measured by federal standards, including the ADEA period of limitation, not the far longer six year period otherwise applicable under the NJLAD. In finding that the federal limitations period is the appropriate yardstick, the court below directly relied on the precedent from this Court requiring that:

> [w]here a federal statute establishes a limitation period for the enforcement of federal rights, and that period is an integral part of the right created, that limitation must be applied in actions brought in state courts, whether the state statute be longer or shorter. Pet. App. 30a-31a.[8]

The primacy of the federal limitations period under the ADEA itself was underscored by this Court in *Oscar Mayer Co. v. Evans,* 441 U.S. 750 (1979),

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[8] *See* Del Costello v. Teamsters, 462 U.S. 151, 170-171 (1983); Engel v. Davenport, 271 U.S. 33 (1976); Atlantic Coast Line R. Co. v. Burnette, 239 U.S. 199 (1915); *see also* McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 228-230 (1958).

where, as the New Jersey Supreme Court noted (Pet. App. 32a), a shorter state period of limitations was to be ignored as inconsistent with federal policy.

The ADEA, of course, does impose rigorous limitations on the exercise of ADEA suit rights, which limitations are, *inter alia,* "... intended to promote the speedy, informal, non-judicial resolution of [age] discrimination claims." *See, e.g., McClinton v. Alabama By-Products Corp.* 743 F. 2d 1483, 1485 (11th Cir. 1984); *Wippel v. Prudential Insurance Co..,* 33 Fair Empl. Prac. Cases (BNA) 412 (D. Md. 1982). The law is crystal clear that age discrimination claimants cannot state an ADEA claim unless they first file an administrative charge within 300 days of the date of the accrual of their cause of action. 29 U.S.C. § 626(d)(2). The federal courts routinely enforce this time limit, which petitioners concede they did not meet. Pet. 25.[9]

Because the time limit within 29 U.S.C. § 626(d)(2) of the ADEA is "an integral part of the right created" under the ADEA, it is not a mere rule of procedure but, in fact, a *substantive limit* on the rights of petitioners, binding in the courts of New Jersey. *Whitfield v. City of Knoxville,* 756 F.2d 455, 461 (6th Cir. 1985). Emphasizing the substantive nature of the time limits written into the ADEA, the Sixth Circuit wrote:

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[9] *See, e.g.,* Reich v. Dow Badische Corp., 575 F.2d 363, 367-68 (2d Cir.), *cert. denied,* 439 U.S. 1006 (1978); Lutz v. Association Films, Inc., 552 F. Supp. 985 (S.D.N.Y. 1982); Quinn v. Bowman Publishing Co., 445 F. Supp. 780, 784-85 (D. Md. 1978); Travers v. Corning Glass Works, 76 F.R.D. 431, 432-33 (S.D.N.J. 1977).

> [W]here one jurisdiction [here, the federal government] by statute creates a new legal right unknown at common law and in the same statute limits the time period during which that right may be enforced, then the limitation is a condition attached to the underlying substantive right and does not limit merely the remedy.

756 F.2d at 461-62.

In light of the federal essence of petitioners' suit under New Jersey law and of the substantive character of the time limits within the ADEA, petitioners' argument that preemption does not apply here is utterly unconvincing.[10] Acceptance of their theory would mean that a suit indisputably due for peremptory dismissal under federal law could nonetheless be heard under state law, a result totally anomalous and unacceptable in view of the surpassing interest in federal uniformity of employee benefit plan administration expressed in ERISA.[11]

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[10] *Compare* Maynard v. Revere Copper Products, Inc., 773 F.2d 733 (6th Cir. 1985) (in area of federal supremacy, when claim under federal law would be time-barred, claim stated under state law could not survive; "[a] ruling to the contrary would mean that the uniformity required in determining limitations for such claims would be lost").

[11] In this regard, it is specious to assert, as petitioners have done, that *Shaw* was concerned only with inhibiting "the ability of employers to *create* plans" and thus restricted ERISA preemption to substantive rules of state law. Pet. App. 27 (emphasis supplied). ERISA's preemption language is grounded in a congressional intent to simplify the burden of *administering* plans by eliminating from the picture the wide variety of state laws that impact thereon. Although the facts in *Shaw* involved substantive rules of state law, the broad language and effect of

The decision of the court below avoids what otherwise would be regulatory chaos. Without preemption of the inconsistent state law enforcement provisions at issue here, an employee benefit plan such as the HSSRP would be subject to a patchquilt of widely varying limitations periods in each jurisdiction in which a multi-state company such as respondent operates. Since pension plans invariably involve many parties and large amounts of money, it is especially vital that age discrimination challenges be promptly identified and resolved within the period provided by federal law. Under the result advocated by petitioners, however, as the Supreme Court of New Jersey pointed out, "plan administrators would not know when repose was granted against claims of discrimination under the ADEA." Pet. App. 35a. Inconsistent state regulation, not the federal uniformity which it was a foremost purpose of ERISA to achieve, would be the sure result.

It is true, as petitioners say (Pet. 33), that the ADEA envisions state and federal cooperation in the enforcement of prohibitions against age discrimination. That proposition, however, begs the question presented. The ADEA requires only temporary "deferral" to state administrative *agencies* of charges *otherwise proper* under the ADEA.[12] *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). Nonetheless, as the

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the holding plainly encompass all state regulation of employee benefit plans including, necessarily, seriously clashing remedial and enforcement provisions. *See* f.n. 6, 7, *supra*.

[12] As we demonstrate in part II, below, petitioners' direct suit under NJLAD was not "otherwise proper" under the ADEA and, in fact, was entirely outside the ADEA structure of joint federal and state enforcement.

Supreme Court of New Jersey properly noted, *deferral does not enlarge the federal right.* (Pet. App. 35a). Moreover, giving effect to the longer limitations period of the NJLAD furthers neither of the oft-cited purposes underlying deferral:

> [W]e believe that invocation of the state judicial remedy after a federal remedy is no longer available does not further the federal program. There are two basic purposes for deferral: (1) to provide rapid and more expeditious disposition of cases, including mediation rather than litigation, and (2) to avoid burdening the federal system. Neither of these federal purposes is fulfilled by reversing the sequence contemplated by the ADEA. Pet. App. 38-39.

In this regard, petitioners' concern that the effect of the preemption here is to increase the burden on the EEOC and federal court system (Pet. 35) is misguided. Petitioners' failure in this case to activate the ADEA enforcement mechanism in a timely fashion means that their claim could never have been adjudicated in the federal arena, hence preemption of their claim could not possibly impose a burden on the federal system.

II. Preemption Of Petitioners' Claim Is Proper For the Independent Reason That Their Election To File A Direct Suit Under the NJLAD Negated The Opportunity for a Mediative Resolution That Is Required By The ADEA

A subsidiary but important basis of the decision of the Supreme Court of New Jersey is that the ADEA is not "impaired" by preempting petitioners' suit where petitioners, by filing directly in Superior Court,

sidestepped the mediative processes provided in the NJLAD under the auspices of the NJDCR. Pet. App. 40a.[13] Since the ADEA places no enforcement reliance on petitioners' direct suit under NJLAD § 10:5-13, no impairment to ADEA occurs with its preemption.

Upon the filing of a timely administrative charge, the ADEA mandates that the EEOC "... shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d). As the Supreme Court of New Jersey noted (Pet. App. 36a), the requirement of prior invocation of the administrative remedy serves the important ADEA goals of prompt notice, opportunity for mediative resolution and avoidance of litigation; ADEA suits are routinely dismissed when these prerequisites are not satisfied. *See* p. 11, *supra.* Like the administrative prerequisites of Title VII, these ADEA requirements are "... not legal hypertechnicalities ... [but] basic elements of the administrative remedy." *Martin v. Easton Publishing Company,* 478 F. Supp. 796 (E.D. Pa. 1979); *see also, Great American Savings & Loan Association v. Novotny,* 442 U.S. 366 (1979).

To trigger enforcement rights under the federal scheme, the ADEA also mandates prior resort to available state administrative remedies in "deferral"

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[13] As is its federal partner the EEOC, the NJDCR is authorized under the NJLAD to investigate promptly age discrimination charges lodged with it, to determine probable cause and is obliged to try to resolve charges through voluntary means short of judicial proceedings, including "... conference, conciliation and persuasion." N.J.S.A. § 10:5-13, 14; 29 U.S.C. § 626(d). The NJDCR has a work-sharing agreement with EEOC. *See, e.g.,* 29 C.F.R. § 1626.10.

states—i.e., those which have state agencies with mediative functions. 29 U.S.C. § 633(b);[14] *Oscar Mayer & Co. v. Evans,* 441 U.S. 750 (1979).[15] In providing, through the NJDCR, an administrative opportunity for a conciliatory resolution before litigation within the time limit established by ADEA, the NJLAD does play a limited role in ADEA enforcement. *See,* 29 U.S.C. § 633. The decision of the New Jersey Supreme Court leaves that role completely intact.

By pursuing the option provided by New Jersey of a direct suit under the NJLAD, however, petitioners moved entirely outside this ADEA enforcement structure and failed to activate the ADEA remedial and enforcement provisions at all. In so electing, petitioners foreclosed any opportunity for the mediative resolution before litigation that is required by ADEA. Their appeal to federalism to preserve independent state court proceedings is misplaced because the ADEA's deferral requirement "is grounded not

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[14] "[S]ection 633(b) envisions a state authority equipped . . . to mediate genuine disputes [and] to attempt to resolve disputes through voluntary compliance . . ." *Eklund v. Lubrizol Corp.,* 529 F.2d 247, 249 (6th Cir. 1976), *overruled on waiver issue, Wright v. Tennessee,* 628 F.2d 949, 953 (6th Cir. 1980).

[15] In *Oscar Mayer & Co.,* this Court held that:

> ". . . under [§ 633(b)] of the ADEA, as under § 706(b) of Title VII, *resort to state administrative remedies in deferral States* by individual claimants is mandatory, not optional." *Id.* at 753.

Initial resort to state administrative remedies "is intended to give state agencies a limited opportunity to settle the grievances of ADEA claimants in a voluntary and localized manner so that the grievants thereafter have no need or desire for independent federal relief." *Id.* at 761.

only in federalism . . . but also on a decision by Congress that courts and employers should be spared the burden of unnecessary litigation." *Hadfield v. Mitre Corp.*, 562 F.2d 84, 87 (1st Cir. 1977). Here, therefore, no deferral obligation on the part of EEOC arose and no right of suit under the ADEA eventuated—the ADEA was simply not part of the picture at all. *See, e.g., id.; Forman v. Block Drug Company,* 16 Fair Empl. Prac. Cases 414 (BNA) (E.D.N.Y. 1977).[16]

In sum, the direct suit elected by petitioners here forms no part of the joint federal and state *administrative agency* structure established by the ADEA. Since petitioners never activated their rights under the ADEA and because the right of direct suit forecloses vindication of crucial ADEA objectives, including an opportunity for a mediative resolution, preemption of petitioners' suit does not "alter, amend, modify, invalidate, impair or supersede" the ADEA, thereby making preemption mandatory. Even with

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[16] In *Forman,* the Court dismissed the ADEA suit of those plaintiffs who sued directly under N.J.S.A. § 10:5-13 without exhausting their administrative remedies before the New Jersey DCR. In the process, the Court described the ADEA's deferral policy in the following way:

> "We believe that this federal policy requires deferral to a state agency (but not to a state court) if one exists, even if the state statute permits an election between mutually exclusive remedies of administrative action or judicial proceedings."

Id. at 417; *accord,* Hadfield v. Mitre Corp., 562 F.2d at 87, n. 2 (in a State allowing the choice between administrative and judicial remedies for age discrimination, ADEA deferral prerequisite is not satisfied by bringing private action directly in State court).

petitioners' direct suit preempted, the NJLAD administrative enforcement structure is left intact so that the ADEA is ". . . enforced in precisely the same manner." *Shaw,* 463 U.S. at 103. On this separate but interrelated ground, the limited preemption found by the Supreme Court of New Jersey is plainly correct.[17]

III. Comments With Respect to The Lawfulness Under The ADEA of the HSSRP

As discussed above, resolution of the issue of ERISA preemption of the jurisdictional basis of petitioners' claim does not entail an examination of the merits of that claim. Because petitioners argue the point, we turn briefly to the merits and demonstrate that the HSSRP comes within the exemption in 29 U.S.C. § 623(f)(2) and is lawful, even apart from the exemption, under the core principles of the ADEA.

The claim lodged by petitioners is a groundless challenge to a socially responsible and entirely voluntary early retirement incentive program that was conced-

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[17] In an analogous situation, this Court recently reversed a state court decision on grounds of federal labor law preemption, noting that the "most harmful aspect" of the decision was that it would permit a state law suit to proceed when the plaintiff had not made prior use of a non-judicial remedy that federal law imposed as a prerequisite to filing suit in court. Allis Chalmers Corp. v. Lueck, 471 U.S. ___, ___, 105 S.Ct. 1904, 85 L.Ed. 2d 206, 220 (1985). *See also,* Utley v. Varian Associates, 625 F. Supp. 104 (N.D. Cal. 1985) (even if prohibitions of Executive Order 11246 were cognizable in a suit brought pursuant to a state employment discrimination statute, the provisions of the state statute allowing a direct court action were preempted as being incompatible with the administrative enforcement scheme of federal law.).

edly designed to benefit not only the participants, but also petitioners themselves, in the context of an unavoidable reduction in force. Although declining to rule on the legality of the HSSRP in view of the other grounds for dismissal discussed above, the court below intimated its view of the merits when it noted "... the apparent impediments to [petitioners'] claim posed by [the] savings provisions of [§ 29 U.S.C. § 623(f)(2) of the ADEA]." Pet. App. 3a. Indeed, the HSSRP meets all the tests for the *bona fide* plan exemption of the ADEA and, on this separate ground, petitioners' claim was properly preempted and dismissed.[18]

The ADEA explicitly exempts from its prohibitions any *bona fide* employee benefit plan that is not a subterfuge to evade the purposes of the statute. 29 U.S.C. § 623(f)(2).[19] As petitioners concede (Pet. 38), the HSSRP is a *bona fide* plan in that it exists and pays benefits. *United Air Lines, Inc. v. McMann,* 434 U.S. 192 (1977). Far from being a subterfuge to evade the ADEA,[20] the HSSRP is a completely *voluntary*

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[18] Under this Court's holdings in *Shaw* and *Alessi,* so much of the NJLAD as forbids what the ADEA allows is preempted. Shaw, *supra,* 436 U.S. at 105-06, Alessi v. Raybestos Manhattan, Inc., 451 U.S. 504 (1981).

[19] The ADEA exempts actions taken by an employer:

> in observance of the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter.

29 U.S.C. § 623(f)(2); *See* Pet. 5-6.

[20] Petitioners' argument to the contrary—that the HSSRP was designed to force older employees to retire (Pet. 38)—is pre-

reduction in force program which mirrors that provided by the federal government and held lawful in *Mason v. Lister,* 562 F.2d 343 (5th Cir. 1977). *See also, Patterson v. Independent School District No. 709,* 742 F.2d 465, 467 (8th Cir. 1984).

In *Mason,* as here, a voluntary early retirement incentive pension plan[21] was offered for a limited "window" period during a reduction in force ". . . to encourage more senior employees to leave the work force . . . voluntarily at an earlier than usual age to minimize the necessity of laying off younger employees during a period of staff reduction." *Id.* at 345.[22]

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posterous as is shown not only by the undisputed voluntary nature of the plan but also by the fact that the entire purpose of their lawsuit is to gain entry to the HSSRP, which they disingenuously label as a "subterfuge." *Compare* Coburn v. Pan American World Airways, 711 F.2d 339, 344 (D.C. Cir.), *cert. denied,* 464 U.S. 994 (1983); Henn v. National Geographic Society, 40 Fair Empl. Prac. Cases (BNA) 1186, 1187 (N.D. Ill. 1986).

[21] EEOC regulations expressly approve voluntary early retirement plans:

> Neither section 4(f)(2) nor any other provision of this Act makes it unlawful for a plan to permit individuals to elect early retirement at a specific age or at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age. 29 C.F.R. § 1625.9(f).

Several other courts also have sanctioned voluntary early retirement plans. *See e.g.,* Ackerman v. Diamond Shamrock Corp., 670 F.2d 66, 88-89 (6th Cir. 1982); Toussaint v. Ford Motor Co., 581 F.2d 812, 815-16 (10th Cir. 1978).

[22] The reports accompanying the Federal Employee Early Retirement Act, which created the program at issue in *Mason,* state these reasons for Congress's approval of plans such as the

Like petitioners, the *Mason* plaintiff had the requisite years of service but did not meet the attained age criterion within the "time window". In dismissing the ADEA suit, the Fifth Circuit ruled that the early retirement incentive pension plan was a *bona fide* pension plan which, because strictly optional with employees, was not a subterfuge. 562 F.2d 346. Thus, an age specific eligibility limit in a plan which has such benign purposes as the HSSRP is lawful and a person too young to satisfy the plan's limit has no claim. *Accord Patterson v. Ind. School Dist. #709, supra,* (*voluntary* early retirement incentive plan is *a fortiori* not a subterfuge).

As they have all along, petitioners recite to this Court an inapposite litany of cases dealing with the denial of lump-sum severance pay to older workers upon the closure of a plant: *Equal Employment Opportunity Commission v. Borden's Inc.*, 724 F.2d 1390 (9th Cir. 1984); *Equal Employment Opportunity Commission v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983); and *EEOC v. Great Atlantic and Pacific Tea Company,* 618 F. Supp. 115 (N.D. Ohio,

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HSSRP:

> "Reductions in force have a depressing effect on employee morale and result in severe personal hardships caused by loss of income and uncertainty regarding future employment. . . . To the extent that attrition, particularly in retirement, reduces the need for involuntary separations and the chain-effect displacement of employees with lower retention rights of [sic] those with higher retention rights, these hardships and disruptions are mitigated."

S.Rep. No. 152, 93d Cong., 1st Sess. 4-5 (1973); H.Rep. No. 93-38, 93d Cong., 1st Sess. (1973), *reprinted in* 1973 U.S. Code Cong. & Ad. News at 1396, 1398.

1985) (Pet. 35-44). Here, unlike in the foregoing cases, age 55 and older employees were *included* in the HSSRP based on their eligibility for early retirement. Further, unlike the severance pay in the cases cited by petitioners, the HSSRP is not a mere fringe benefit but an ERISA pension plan providing its beneficiaries with retirement income over a number of years. The HSSRP thus qualifies for the ADEA § 4(f)(2) exemption even under those cases. *See Borden's*, 724 F.2d at 1396 (through the section 4(f)(2) exemption, "Congress sought to avoid disrupting pensions and other complex, on-going benefit schemes;" in contrast, Borden's severance pay was a "one-time, *ad hoc* cash payment"); *Westinghouse*, 725 F.2d at 224 ("By the express language of 4(f)(2), a plan qualifies if it is a retirement, insurance or pension plan").

The HSSRP is to be judged, if at all, against the background of the undisputedly benign purposes with which it was conceived. The eventual closure of respondent's facility does not "metamorphize" the HSSRP from its initial role to that of a mere severance program. Moreover, with its time "window" having "closed" long before the eventual closure of the plant, older workers were able to retire far in advance of any eventual involuntary separation that might occur upon closure and younger workers were able to earn wages, accrue service, and enjoy the other emoluments of a job longer than they might have without the plan. Petitioners' attempt to cast a discriminatory light on an honorable program designed for the benefit of the entire workforce is therefore a perverse distortion of the facts of record.

Even apart from the exception in 29 U.S.C. § 623(f)(2), the ADEA does not prohibit a program

such as the HSSRP, which favors older, voluntarily retiring employees. The HSSRP thus fosters the central purpose of the ADEA to help older employees (29 U.S.C. § 621) and the ADEA's policy to encourage generous treatment of older workers in recognition of their special problems. At the time the HSSRP was adopted, United States Department of Labor ("DOL") regulations allowed older workers to be benefited because of their age in a variety of contexts,[23] a policy continued by EEOC. *See* 29 C.F.R. § 1625.2(b); 46 Fed. Reg. 47724 (1981).

The HSSRP self-evidently fosters the ADEA policies embodied in these DOL and EEOC regulatory pronouncements. As is the federal government's own special early retirement program, the HSSRP is a completely rational and lawful way to address the needs of older employees who might otherwise experience disproportionate hardship. *See Mason v. Lister, supra,* 562 F.2d at 346; *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357 (D.N.J. 1982); *compare Rock v. Westinghouse Corp.*, 1 Mass. Discrim. L. Rep. 1262 (MCAD 1979), *aff'd sub nom. Rock v. Massachusetts Commission Against Discrimination,* Mass. ___, 424 N.E.2d 244 (1981). Accordingly, the

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[23] *E.g.*, U.S. Dept. of Labor Opin. No. WH 451 (Jan. 31, 1978) (upholds severance pay plan providing greater benefits to older workers because of their age); U.S. Dept. of Labor Opin. No. WH-419 (July 1, 1977) (allows employers to excuse older employees "from comparatively undesirable work assignments"); U.S. Dept. of Labor Opin. No. WH-404 (Aug. 26, 1976) (contracts may reserve certain number of positions for the older segment of the protected age group); U.S. Dept. of Labor Opin. No. WH-389 (June 25, 1976) (allows granting of "preferred status" in job bidding to certain employees aged 55 or older with 15 years of service).

HSSRP does not constitute unlawful age discrimination under the ADEA.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.[24]

Respectfully submitted,

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[24] Petitioners' arguments (Pet. 44-49) addressed to the defense of "good faith reliance" on administrative regulations provided in § 10 of the Portal to Portal Act, 29 U.S.C. § 259 and adopted by the ADEA, are completely baffling as this particular contention was neither raised by respondent nor considered by the Supreme Court of New Jersey in its decision.

APPENDIX

APPENDIX A

AGE DISCRIMINATION ACT

29 U.S.C. § 633. Federal-State Relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated ***.

APPENDIX B

NEW JERSEY LAW AGAINST DISCRIMINATION

Sec. 10:5-13. Remedies; Complaint, Persons Entitled to File.

Any person claiming to be aggrieved by an unlawful employment practice or an unlawful discrimination may, by himself, or his attorney-at-law, make, sign and file with the [D]ivision [on Civil Rights] a verified complaint in writing ***.

Sec. 10:5-14. Investigation of Complaint; Attorney General's Duties.

After the filing of any complaint, the Attorney General shall cause prompt investigation to be made in connection therewith and advise the complainant of the results thereof. If the Attorney General shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful employment practice or the unlawful discrimination complained of by conference, conciliation and persuasion during a period terminating not later than 45 days from the date of the finding of probable cause.

Sec. 10:5-18. Rules of Practice; Limitations.

The Attorney General shall establish rules of practice to govern, expedite and effectuate the foregoing procedure and his own actions thereunder. Any complaint filed in the division or in any municipal office persuant to this act must be so filed within 180 days after the alleged act of discrimination.

APPENDIX C

NEW JERSEY STATUTES ANNOTATED

Limitations of Actions

2A:14-1. 6 Years

Every action at law for trespass to real property, for any tortious injury to real or personal property, for taking, detaining, or converting personal property, for replevin of goods or chattels, for any tortious injury to the rights of another not stated in sections 2A:14-2 and 2A:14-3 of this title, or for recovery upon a contractual claim or liability, express or implied, not under seal, or upon an account other than one which concerns the trade or merchandise between merchant and merchant, their factors, agents and servants, shall be commenced within 6 years next after the cause of any such action shall have accrued.

(5)

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NO. 85-1958

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1985

FRED S. NOLAN, et al.,

Petitioners,

vs.

OTIS ELEVATOR COMPANY and the ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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Pursuant to Rule 22 of the Rules of this Court, petitioners reply herein to arguments raised in the Brief

in Opposition to the Petition to Certiorari submitted on behalf of respondent Otis Elevator Company.

Otis argues that this Court's decision in Oscar Meyer and Company v. Evans, 441 U.S. 750, 99 S.Ct. 2066, 60 L.Ed.2d 609 (1979) somehow supports its position by the holding that although recourse to state remedies is required before a federal action under the ADEA can be brought, the state complaint need not be timely filed. Actually, it cuts the other way. If an untimely proceeding initiated under state law, which clearly will be dismissed at that level, satisfies the requirements of the ADEA and the action can then proceed, why is the purpose of aiding enforcement of the federal law through state means not better served by the filing of a

timely lawsuit which may actually result in disposition of the case thereby shielding EEOC and the federal courts from any extra burden?

In Shaw v. Delta Airlines, 463 U.S. 85, 103 S.Ct. 1890 (1983) the Court did hold that ERISA does not preempt state anti-discrimination laws to the extent that those laws were part of the federal statute's scheme of enforcement. 463 U.S. at 101, 103 S.Ct. at 2902. Otis would have that read very narrowly in a manner clearly at odds with the intent of Shaw. Thus, the ADEA requires only a brief deferral to a state agency and then a federal action may proceed. Yet does this mean that where an administrative proceeding is instituted in the state agency and the 60 day deferral period has ended, any further

proceedings by that state agency are preempted? Surely that was not this Court's meaning?

What this Court did say in Shaw was that limiting remedies for discrimination to federal remedies is what would impair the federal statute. 463 U.S. at 102, 103 S.Ct. at 2902-2903. The only basis on which ERISA would preempt a state anti-discrimination law would be where that law was broader than a federal statute. Only when something allowed under Title VII was barred by the state statute would the interdependency of the laws be lacking. 463 U.S. at 103, 103 S.Ct. at 2903. In fact, when discussing the "minor practical difficulties" which would be imposed on administration of state law by the need to determine whether

substantive provisions are consistent with federal law, the Court in Shaw said:

> It seems more than likely, however, that state agencies and courts are sufficiently familiar with Title VII to apply it in their adjudicative processes.
>
> 466 U.S. at 106, 103 S.Ct. at 2904 (emphasis added)

The above language would certainly seem to indicate that it was contemplated that both administrative and court proceedings in the states under their respective laws could go forward as long as care was taken to make sure that practices legitimized by Title VII were not being prohibited under state law.

That Otis is further wrong when it argues that the uniformity that this court sought to preserve in Shaw is

affected by statute of limitations considerations is demonstrated by the fact that the discussion of the need for uniformity in Shaw was limited to the need to avoid substantive differences in state laws, depriving an employer of the ability to provide the same benefits in each state. See 463 U.S. at 105, 103 S.Ct. at 2904. A different statute of limitations has no effect on what benefits an employer may provide. By knowing what is allowed under Title VII or the ADEA, an employer knows what is allowed in any state for employee benefits. While Otis claims that more than substantive uniformity was contemplated in Shaw, it cites nothing in support of that proposition and admits that the facts in Shaw were limited to substantive rules of state

law. Brief in Opposition at page 12, n.11.

A number of cases cited by Otis do not support the propositions for which they are cited and shall be addressed briefly. For example, Allis-Chalmers Corp. v. Lueck, 471 U.S. ___, 105 S.Ct. 1904 (1985) concerned preemption of a state cause of action for bad faith handling of an insurance claim. This Court held that the state law claim was preempted because of the general preemption of any labor contract matters by Section 301 of the Labor Management Relations Act. The case turned on principles peculiar to the area of labor law and has no applicability here.

Nor is Utley v. Varian Associates, 625 F.Supp. 104 (N.D. Cal.

1985) any more relevant. In Utley, the alleged misconduct was violation of a federal Executive Order regarding inclusion of non-discrimination and affirmative action programs in all federal government contracts. The plaintiff attempted to allege a violation of the California Fair Employment and Housing Act by virtue of violations of requirements imposed by the Executive Order. The court held that because it had previously been established that violations of the Executive Order could not be the basis of a private cause of action for damages, the plaintiff in Utley could not attempt to create such a private cause of action by claiming that it arose under the California statute. It has nothing to do with the issue posed

here, where a direct violation of a state statute is alleged. In Utley, the state statute was simply being used as a mechanism to attempt to assert what was clearly a federal claim for violation of the president's Executive Order.

Otis attempts to bootstrap its argument regarding the statute of limitations by reference to Maynard v. Revere Copper Products Inc., 773 F.2d 733 (6th Cir. 1985). (Brief in Opposition at page 12, n.10). There, as in Allis-Chalmers, the case turned on the fact that the cause of action asserted, for unfair representation by a labor union, was totally preemted by the Labor Management Relations Act. The fact that the federal statute of limitations had run required dismissal of the state claim because in any action

in state court only federal law could be applied due to the overriding preemption. Here the question is whether the differing statute of limitations itself requires a finding of preemption as held by the New Jersey Supreme Court, or whether only considerations of substantive uniformity between federal and state anti-discrimination statutes should be applied as urged by petitioners.

Turning to the question of whether substantively the so-called plan adopted by Otis, the HSSRP, is lawful under the ADEA, petitioners briefly want to address the two cases relied upon by Otis.

In Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), under the Federal Employees Early Retirement Act,

employees subjected to a reduction in force could take early retirement either if they were 50 years old or more with 20 years or more of service or, if under age 50, had 25 years or more of service. The plaintiff was under 50 years old and had 20 years of service, and claimed his ineligibility for early retirement violated the ADEA. The court held the statute could not be a subterfuge because retirement was optional and the statute predated the ADEA. 562 F.2d at 346.

One obvious distinction between Mason and this case is readily apparent. Even those employees under age 50 could qualify for the plan, needing more years of service. Here, anybody under age 55 was ineligible no matter how many years of service they

had. Most significant is the legislative history quoted by the court in Mason:

> Under present law, an employee who is at least age 50 and had at least 20 years' service or 25 years' service regardless of age, may retire on an immediate annuity if he is involuntarily separated, as when he is reached by reduction in force. Unless the employee is old enough and has sufficient service to retire optionally (age 55 with 30 years of service, age 60 with 20, or age 62 with 5), if he is not reached for reduction in force, he does not have the right to retire even if he is desirous of doing so, and thus [the law permits] an employee who wants to continue to work to be retained. The proposed legislation would simply give the long service employee who is not eligible to retire under the regular optional retirement provision of the law the opportunity to retire voluntarily during a limited period when his agency is

undergoing a major reduction in force.

S. Rep. #152, 93rd Cong. 1st. Sess. 5 (1973) quoted in Mason, 562 F.2d at 347 (emphasis added)

The emphasized material in the above quotation indicates congressional approval of making early retirement available to those who would not otherwise qualify when a reduction in force occurs. At Otis, all of those who participated in the HSSRP were already eligible for early retirement under the regular retirment plan, and did not need creation of any new plan in order to elect to retire rather than be terminated. Thus, the Mason decision does not apply to the facts of this case.

While Otis, as it has throughout this case, attempts to brush

aside the decisions in EEOC v. Borden's Inc. 724 F.2d 1390 (9th Cir. 1984) and EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. den. ____ U.S. ___, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984), that attempt is completely lacking in substance. The question is not whether the HSSRP could qualify as a plan under ERISA, but rather if it is a plan within the exemption provision of the ADEA for bona fide pension plans. The decisions in Borden's and Westinghouse make it clear that it is not. Furthermore Otis continues to seek to have this Court ignore the most salient fact about the HSSRP, namely that at the time it was actually given, the decision to close the plant entirely had been made and no one had a choice of voluntary early retirement as opposed to

lay-off. Those who went into the HSSRP were simply taking the greater benefits available as would anyone in those circumstances. Were the plant not being closed, this might be a different case, but what might have been is not germaine.

By the same token Otis can claim no solace from Patterson v. Independent School District No. 709, 742 F.2d 465 (8th Cir. 1984). In Patterson the plan at issue was designed to supplement the general pension plan already in effect. Under the regular plan an older teacher would have a higher retirement pay because years of service were taken into account. The supplemental plan offered an extra bonus payment for taking retirement at an earlier age. The plaintiff complained

that he was discriminated against because he could not take advantage of this early retirement benefit. However, the only reason he could not was that the plan was only created to become effective in 1980 and he retired in 1981 by which time he was already too old for any retirement to be considered "early." Thus, the only grounds advanced for claiming that the plan was discriminatory was that it had not been created sooner. Moreover, Patterson did not involve closing down the school district where everybody was going to lose their job and the only question was differing benefits. Therefore it has no precedential value for the facts presented here.

What the participants in the HSSRP received was in reality nothing

more than a form of severance pay given that they were losing their jobs no matter what they did. Given that fact, the Borden's and Westinghouse cases are much more on point than either Mason or Patterson. Furthermore, Otis has failed to address the EEOC regulations which provide that additional severance pay to older employees may be lawful. As the Appellate Division of the New Jersey Superior Court correctly found in this case, a fact issue was presented on that score which can only be decided after a full record is created.

CONCLUSION

For the aforestated reasons, the petition for a Writ of Certiorari should be granted.

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